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In The Supreme Court of the United States

OCTOBER TERM, 1982

ANNE M. GORSUCH, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
PETITIONER

v.

SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether it was "appropriate," within the meaning of Section 307(f) of the Clean Air Act, 42 U.S.C. 7607(f), to award over $90,000 in attorneys' fees and costs to parties who failed to prevail on any aspect of their challenge to regulations promulgated by the Administrator of the Environmental Protection Agency.*

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*The parties involved in the attorneys' fees litigation are solely those appearing in the caption of the case in this Court. This case began, however, as eight consolidated petitions for review under the Clean Air Act. At that stage of the proceedings, the litigants included a large number of other parties, mostly electric utilities, whose names are collected in Appendix D, *infra*, 41a–42a.

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SIERRA CLUB AND ENVIRONMENTAL DEFENSE FUND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a–22a) holding the Administrator liable for attorneys' fees and costs is reported at 672 F.2d 33. The opinion of the court of appeals (App. B, *infra*, 23a–38a) determining the amount of those fees and costs is not yet officially reported.

JURISDICTION

The judgment order of the court of appeals (App. C, *infra*, 39a–40a) was entered on July 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f), provides in pertinent part as follows:

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate.

STATEMENT

Following a totally unsuccessful challenge to regulations promulgated by the Environmental Protection Agency (EPA), respondents Sierra Club and Environmental Defense Fund (EDF) sought an award of attorneys' fees and costs against the government under Section 307(f) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(f). Although respondents had not prevailed on any issue in the litigation, the court of appeals determined that they were entitled to fees and costs. Before discussing the court's ruling on attorneys' fees, we briefly describe the underlying merits litigation.

1. Section 111 of the Clean Air Act, 42 U.S.C. (Supp. IV) 7411, requires the EPA to set performance standards limiting emissions from new or modified air pollution sources that may be reasonably anticipated to endanger the public health or welfare. In 1979, EPA promulgated revised new source performance standards for coal-fired generators capable of firing more than 250 million British thermal units (MBtu) per hour.[1] The performance standards limited sulfur diox-

[1] A complete history of the rulemaking is set forth in the court of appeals' merits opinion, *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981), and need not be repeated here. As described by the court of appeals, the final new source performance standards regulated emissions of sulfur dioxide, particulate matter, and nitrogen oxides. Respondents, however, only challenged certain features of the sulfur dioxide standard. Ac-

ide (SO_2) emissions to a maximum of 1.2 pounds per MBtu. In addition, powerplants with potential, *i.e.*, uncontrolled, SO_2 emissions greater than 0.60 pounds per MBtu were required to reduce such emissions by 90%; powerplants with potential emissions less than 0.60 pounds of SO_2 per MBtu were required to reduce them by no less than 70%.

The Sierra Club, EDF, and industry organizations filed petitions for review of the new source performance standards in the United States Court of Appeals for the District of Columbia Circuit.[2] Sierra Club challenged EPA's action on three grounds: (1) that EPA lacked statutory authority to adopt a "variable" standard for SO_2 emissions, *i.e.*, a standard that allowed percentage reductions in emissions ranging from 70% to 90% (*Sierra Club* v. *Costle*, 657 F.2d 298, 316 (D.C. Cir. 1981)); (2) that EPA's standard was not supported by the rulemaking record (*id.* at 316–317); and (3) that EPA failed adequately to apprise the public of its intention to adopt a variable reduction strategy, thereby depriving the public of a fair opportunity to comment on the adoption of a variable standard in the final rule (*id.* at 317–318). EDF challenged the performance standards on only one ground—the alleged procedural impropriety of "*ex parte* contacts." EDF asserted that a more stringent SO_2 emission ceiling was attainable and would have been adopted but for an "ex parte blitz" on EPA after the close of the comment period, during which EPA was pressured not to adopt a more stringent standard (*id.* at 386).

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cordingly, the above description of the merits litigation is confined to that aspect of the new source performance standards.

[2] Jurisdiction in the court of appeals was properly predicated on Section 307(b)(1) of the Clean Air Act, 42 U.S.C. (Supp. IV) 7607(b)(1), which provides that judicial review of many of the Administrator's actions, including the promulgation of new source performance standards, may be had only in the United States Court of Appeals for the District of Columbia Circuit.

On April 29, 1981, the court of appeals rendered its decision on the merits. *Sierra Club* v. *Costle*, *supra*, 657 F.2d 298. The court rejected all of Sierra Club's claims. First, it concluded that EPA had ample statutory authority to adopt a variable standard (657 F.2d at 318-322). Second, it rejected Sierra Club's charge that the variable standard was without basis in the record. After reviewing the technical background for the standard, the factors considered by EPA in adopting the standard, and examining the agency's stated rationale, the court held that EPA's action was reasonable (*id.* at 322-352). Finally, the court rebuffed Sierra Club's claim that EPA's adoption of a variable standard was procedurally defective. The court found that the public in general and Sierra Club in particular had fair notice of and opportunity to comment on the agency's intention to adopt a variable standard (*id.* at 353-356).

EDF fared no better on its claim. The court separated the allegedly improper *ex parte* contacts into two categories for analytical purposes: (1) written comments submitted after the close of the comment period; and (2) meetings after the close of the comment period with the President and heads of other Executive Branch agencies, congressional representatives, and private parties (657 F.2d at 386-387). With respect to written comments received after the close of the comment period, the court held that nothing on the face of the Clean Air Act prohibited the agency from receiving and considering such materials as long as they were placed in the agency's rulemaking docket. All such materials had in fact been properly docketed in this case (*id.* at 397-400).

With respect to the meetings, the court again noted that they were not prohibited by the Act; indeed, the court thought that such meetings were desirable given

the importance of openness and accessibility on the part of public officials (657 F.2d at 400–401). The court further noted that summaries of seven of the nine contested meetings had been placed in the rulemaking docket, and held that this fully satisfied all statutory and due process requirements (*id.* at 386–410). A summary of one of the remaining two meetings was omitted from the docket through inadvertence. The court found that this was an honest error and that, in any event, the particular meeting was not of the type required to be entered on the rulemaking docket (*id.* at 404). The final meeting included the President and members of the White House staff. The court expressly recognized the President's constitutional authority to control and supervise executive policymaking and was hesitant to fashion any new rule that would impair the President's ability to fullfill this role (*id.* at 405–407). In this particular instance, the court found that since EPA did not base the rule on any information or data arising from the meeting, there was no justification for requiring it to be docketed on the rulemaking record (*id.* at 407).

Finally, the court noted that it could find no evidence of impermissible congressional pressure on EPA arising out of two meetings (both entered on the rulemaking docket) that the Administrator had with West Virginia Senator Robert Byrd. EDF's claim in this regard was rejected because it failed to present any evidence that Senator Byrd had sought to influence the rulemaking by injecting extraneous considerations into the agency's decisionmaking processes (657 F.2d at 408–410).

2. After losing every issue on the merits, Sierra Club and EDF, relying on Section 307(f) of the Clean Air Act, filed motions seeking awards of attorneys' fees and costs. Although settlement discussions were initiated between respondents and the Justice Department lawyer then assigned to the litigation, no agreement was ever consummated because the Assistant Attorney

General in charge of the matter declined to approve settlement. Thereafter, the fee requests were fully briefed by respondents and the government. Sierra Club and EDF both argued that an award of fees and costs was "appropriate" because they had conferred certain public benefits by bringing their unsuccessful lawsuits. Specifically, they contended that they had advanced the purposes of the Clean Air Act by enabling the court of appeals to construe the provisions of Section 111 of the Act, thus providing future guidance to EPA and the public as to how that provision should be interpreted and implemented. EDF also argued separately that litigation of the *ex parte* contacts issue had clarified the "rules of the game" as to contacts with agency officials during informal rulemakings. The government opposed any fee award whatsoever because respondents not only lost the litigation but failed to advance the purposes of the Clean Air Act in any concrete or tangible fashion.

On February 5, 1982, the court of appeals issued an opinion rejecting all the government's arguments in opposition to the motions for fees (App. A, *infra*, 1a–22a).[3] After examining the text of Section 307(f) and its legislative history, the court concluded that an award of fees was "appropriate" where the party

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[3] Actually, the court issued its opinion on January 22, 1982. That opinion was later withdrawn and a substitute opinion issued on February 5, 1982. On the same day, the court issued attorneys' fee decisions in *Alabama Power Co.* v. *Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982) (petition for rehearing pending, No. 78–1006), and *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982) (petition for rehearing pending, No. 79–1580). The principal differences between the January and February *Sierra Club* opinions are that the February 5 opinion *adds* a footnote responding to Judge Wilkey's dissent in *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 8–33, and *deletes* a passage cautioning that the amount of an award to "self-appointed representatives of the public interest" should be closely scrutinized.

seeking fees had "'substantially contributed' to the goals of the Clean Air Act" (App. A, *infra*, 20a n.10), whether or not the litigation was actually successful. The court further concluded that the express goals of the Clean Air Act included "prompt resolution of serious questions of statutory interpretation" (*id.* at 18a). A litigant could satisfy this goal, the court ruled, by making exemplary presentations on important, complex and novel issues (*id.* at 12a–13a, 18a–19a).

The court then suggested that the parties resume their negotiations over the proper amount of fees to be awarded, and ordered a status report on the negotiations within three months. In May 1982, the parties advised the court that their negotiations had been unsuccessful. Thereafter, Sierra Club and EDF filed amended fee requests encompassing their work on the case-in-chief and on the attorneys' fee dispute. On July 16, 1982, the court of appeals issued its final opinion (App. B, *infra*, 23a–38a). A majority of the panel determined that Sierra Club was entitled to an award of $44,715 in fees and $644.60 in expenses, and that EDF was entitled to an award of $45,874.80 in fees (App. C, *infra*, 39a–40a). Although the court made modest reductions in the number of compensable hours claimed by respondents, the majority awarded fees at the hourly rates respondents had requested and rejected the government's argument that the awards should be reduced to reflect respondents' total lack of success on the merits (App. B, *infra*, 26a–30a, 32a–35a). The majority stated that any such reduction could not be squared with "the Clean Air Act's overriding purpose of encouraging constructive legal challenges * * *" (*id.* at 30a). The court did, however, agree with the government that because of their failure to prevail respondents were not entitled to any "bonus" in addition to their "lodestar" fees (determined by multiplying the hours reasonably expended by a reasonable hourly rate) (*id.*

at 30a–31a). Judge Robb dissented in part, asserting that a reduction in respondents' lodestar fees was "appropriate" because respondents had "batted zero" and "[i]f counsel were private practitioners their clients might well complain that they could have lost the case for less money" (*id.* at 36a–37a).

REASONS FOR GRANTING THE PETITION

In holding the government liable for attorneys' fees incurred by litigants who do not prevail in any respect, the court of appeals has departed from accepted notions of fee-shifting, and has established a precedent that threatens to impose substantial burdens on the federal courts, administrative agencies and the Justice Department by encouraging unproductive, expensive and time-consuming litigation.[4] The court's decision, fur-

[4] The impact of the court's decision is not necessarily limited to attorneys' fee awards under Section 307(f) of the Clean Air Act. Some 13 other federal statutes contain virtually identical attorneys' fee provisions. See Toxic Substances Control Act, 15 U.S.C. 2618(d); Endangered Species Act of 1973, 16 U.S.C. 1540(g)(4); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. (Supp. IV) 1427(c); Clean Water Act, 33 U.S.C. 1365(d); Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1415(g)(4); Deepwater Port Act of 1974, 33 U.S.C. 1515(d); Safe Drinking Water Act, 42 U.S.C. 300j–8(d); Noise Control Act of 1972, 42 U.S.C. 4911(d); Energy Policy and Conservation Act, 42 U.S.C. 6305(d); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. (Supp. IV) 8435(d); Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. (Supp. IV) 9124(d); and Outer Continental Shelf Lands Act, 43 U.S.C. (Supp. IV) 1349(a)(5). In light of this Court's decision in *Northcross* v. *Memphis Board of Education*, 412 U.S. 427 (1973), that similar attorneys' fee provisions should be interpreted pari passu, it is likely that the ruling below will be extended to claims arising under other statutes. Indeed, a separate panel of the court of appeals has already interpreted the attorneys' fee provision in the Toxic Substances Control Act to permit awards to non-prevailing parties, in part by reliance on the decision in this case. See *Environmental Defense Fund*,

thermore, disregards both settled principles of sovereign immunity and the congressional intent behind Section 307(f) of the Clean Air Act.

1. The court adopted a seemingly benign standard in this case, ruling that an award of attorneys' fees would be "appropriate" whenever a litigant "substantially contributed" to the goals of the Clean Air Act (App. A, *infra*, 20a n.10). There can be little dispute, moreover, that litigation resulting in proper implementation of the statute substantially contributes to Congress' goals. Where the court went fundamentally astray, however, was in its equation of proper implementation of the Clean Air Act with mere judicial "interpretation" of the statute (*id.* at 5a n.3, 8a, 11a, 18a). It is clear that Congress intended to hold the government liable for attorneys' fees in actions that spur proper implementation of the Act by correcting administrative errors (see pages 16–17, *infra*). But it is equally clear that judicial interpretation of the Act is not in itself a goal of the statute. Unless one views litigation as desirable for its own sake, it is difficult to comprehend how implementation of the Act is furthered when a court finds, in the course of interpreting the Act, that the Agency was already implementing it correctly.

Inc. v. *EPA*, 672 F.2d 42, 48 (D.C. Cir. 1982) (petition for rehearing on other grounds pending, No. 79–1580). The government does not plan to seek this Court's review of the decision in *Environmental Defense Fund* v. *EPA* because in that case EDF prevailed on three of the four issues it litigated on the merits; however, the opinion clearly sanctions an award to totally unsuccessful parties. The ruling in the present case is also having an immediate impact on other pending litigation. For example, the Energy Action Educational Foundation is now seeking attorneys' fees and costs under the Outer Continental Shelf Lands Act for its work in the district court, the court of appeals and this Court in *Watt* v. *Energy Action Educational Foundation*, No. 80–1464 (Dec. 1, 1981), notwithstanding the fact that this Court unanimously rejected Energy Action's position on the merits.

The court of appeals' elevation of judicial review to the level of a "goal" of the Clean Air Act is the sole basis for its conclusion that totally unsuccessful litigation is capable of yielding public benefits that justify an award of attorneys' fees. For example, the court stated that "by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation of the Act" (App. A, *infra*, 8a) (footnote omitted). The Agency's implementation of the Act, however, was found to be in full accord with congressional intent, and it is therefore difficult to imagine that the Agency was aided in any way by judicial reaffirmation of its actions. As for congressional reevaluation of the Act, Congress has ample tools at its command to conduct that reevaluation without the assistance of litigants who press unsuccessful claims. The legislative history of Section 307(f) does not support the notion that it was designed to promote unsuccessful litigation for the edification of Congress.

The court below awarded attorneys' fees not only because the respondents brought "complex and novel" issues before it (App. A, *infra*, 13a), but also because "their assistance in the resolution of the issues was substantial" (*ibid.*). The court's reliance on the "substantial nature of petitioners' assistance" (*id.* at 16a), however, is insufficient to justify an award of attorneys' fees.[5] Surely the fact that a litigant's position, though wrong, was competently presented does not make fee-shifting appropriate.

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[5] The court of appeals' estimation of respondents' contribution to the litigation increased markedly between the time it rendered its decision on the merits and its opinion below. For example, in its opinion below the court praised EDF for assisting the court's deliberations on the *ex parte* contacts issue. In the opinion on the merits, however, the court stated that "the parties," presumably including EDF, did not make the court's task of identifying the actions and incidents that gave rise to EDF's complaints "an easy one." 657 F.2d at 386 n.423. The court stated (*id.* at 391):

The court stated that it "was totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard" (App. A, *infra*, 17a). But the court failed to point out that absent this litigation there would have been no need for judicial evaluation of the variable standard in the first place. Similarly, the court found that EDF's contributions expedited and "enriched" its consideration of the *ex parte* contacts issue, and allowed the court to "resolve close questions of interpretation for future rulemaking under the Act" (*id.* at 18a). The court's consideration, of course, was only necessary because EDF raised the *ex parte* contacts issue. Nothing in the Act, moreover, suggests that Congress meant to pay litigants to resolve questions that might not even arise until "future rulemaking[s]" (*ibid.*). An award of attorneys' fees is not "appropriate" merely because it furthers, even substantially, jurisprudential understanding.[6]

EDF does not specify which particular features in each of the above-numerated communications violated due process or constituted errors under the statute; indeed, EDF nowhere lists the communications in a form designed to clarify why any particular communication was unlawful. Instead, EDF labels all post-comment communications with EPA—from whatever source and in whatever form—as "ex parte," and claims that "this court has repeatedly stated that ex parte contacts of substance violate due process."

As noted, the court rejected EDF's position in its entirety (657 F.2d at 386–410). Similarly, the court had no difficulty rejecting Sierra Club's construction of the statute. The court found the language of the statute itself to be relatively clear (*id.* at 319), and concluded that it "critically undercut[]" Sierra Club's position (*id.* at 318). The court found Sierra Club's arguments based on the legislative history no more persuasive. See generally *id.* at 319–322.

[6] Seen in this light, the ruling in this case conflicts with the spirit of the Court's recent decision in *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, No. 80–327 (Jan. 12, 1982). Reviewing the Article III re-

Congress assigned to EPA the expensive, time-consuming and important responsibility of implementing the Clean Air Act. When EPA missteps, Congress has encouraged private litigants to invoke judicial review to put the Agency back on course. But where EPA has not strayed, there is little logic to the assumption that Congress intended to pay self-appointed representatives of the public interest[7] to judicially reaffirm the Agency's actions. Respondents were, of course, free to take their disagreements with the Agency's approach to court, but they should not expect the government to pay them for having its course of action vindicated. Rewarding litigants who actually aid Agency implementation of the Clean Air Act by correcting administrative errors is sufficient incentive for the citizen involvement in the implementation of the Act that was contemplated by Congress. Rewarding unsuccessful litigants who do no more than vindicate the Agency's approach to the statute not only does nothing to assist implementation of the Act but, on the contrary, frustrates that purpose by diverting scarce Agency resources from more pressing needs.[8]

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quirements for standing to sue, the Court there emphasized that federal courts are neither "publicly funded forums for the ventilation of public grievances or the refinement of jurisprudential understanding" nor "judicial versions of college debating forums." Slip op. 8. Yet it is precisely for the ventilation of public grievances and the refinement of jurisprudential understanding that respondents were awarded fees in this litigation.

[7] *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331, 1338–1339 (1st Cir. 1973).

[8] The court of appeals asserted that it would award fees to totally unsuccessful parties only in "exceptional" circumstances (App. A, *infra*, 13a). The court, however, provided no guidelines for ascertaining the "exceptional" case. Implementation of statutes like the Clean Air Act is inherently important and inev-

2. The lower court's liberal interpretation of Section 307(f) is inconsistent with certain fundamental considerations underlying the doctrine of sovereign immunity and the traditional rules governing the allocation of attorneys' fees. The court of appeals' departure from these traditional norms cannot be squared with the literal language of the statute, or its legislative history.

"[T]he United States, as soveriegn, 'is immune from suit save as it consents to be sued ***.'" *United States* v. *Testan*, 424 U.S. 392, 399 (1976), quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). The Court has emphasized that such consent "cannot be implied but must be 'unequivocally expressed.'" *Army and Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6, quoting *United States* v. *Testan*, *supra*, 424 U.S. at 399; *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980).

Where Congress has waived sovereign immunity, its waiver is to be "construed strictly in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951); *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, *supra*, 312 U.S. at 590. Thus, in interpreting a statute that waives the immunity of the United States, the courts should not "enlarge its liability *** beyond what the language requires." *Eastern Transportation Co.* v. *United*

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itably complex, and it will be a rare case that does not raise novel issues that a court, like the one below, might find worthy of resolution. See *id.* at 12a-13a. So long as the present ruling stands, therefore, it can only encourage substantial amounts of lengthy litigation that might otherwise not be brought, at great cost both to the courts and the Executive Branch.

States, 272 U.S. 675, 686 (1927). Strict construction conserves the public fisc and limits recovery to those situations in which it may be confidently concluded that Congress has determined that the government should be liable. See, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 68–69 (1955). These principles are, of course, fully applicable to claims against the government for attorneys' fees.[9] *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267–268 & n.42 (1975).

In addition to the bar that sovereign immunity interposes to fee awards against the government, attorneys' fees generally are not available to parties who do not prevail on any claim.[10] Interpretation of the Clean Air

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[9] This Court's recent decision in *Lehman* v. *Nakshian*, 453 U.S. 156 (1981), illustrates how principles of sovereign immunity should impact upon Section 307(f)'s provision for attorneys' fees in "appropriate" cases. In *Lehman*, plaintiff sued the Navy under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, which waived sovereign immunity for such suits. Plaintiff claimed she was entitled to a trial by jury. The Court noted that, in general, trial by jury is not available in suits against the United States. In light of this general rule, the Court held that "accepted principles of sovereign immunity require that a jury trial right be clearly provided in the legislation creating the cause of action." 453 U.S. at 162 n.9. The Court further explained that "even if the legislative history were ambiguous, that would not affect the proper resolution of this case, because the plaintiff in an action against the United States has a right to trial by jury only where Congress has affirmatively and unambiguously granted that right by statute." *Id.* at 168.

[10] As Judge Wilkey stated in his dissenting opinion in *Alabama Power Co.*, *supra*, 672 F.2d at 13:

> All precedent and statute points to the fair conclusion that there is a general presumption against one side (particularly the winner) paying the other's attorneys' fees. Thus, when in doubt, no award will be made. Dramatic deviations from the American rule will be construed against. Similarly, there is a presumption that non-prevailing parties are not entitled to costs.

Act to allow an award of fees to the Sierra Club and Environmental Defense Fund in this case contravenes this general rule. Such an interpretation should be particularly disfavored here because it increases the burden of the statute on the public fisc. See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 n.8 (1981). Thus respondents' claims for fees should not be allowed unless the Court finds that Congress clearly and "unequivocally" departed from the general presumption against awarding fees to totally unsuccessful litigants. *Id.* at 160–161.

The government does not dispute that Congress has authorized attorneys' fees awards against the government. The legislative history of Section 307(f) clearly demonstrates that Congress meant to waive the government's traditional immunity and to overcome the presumption of the "American Rule" against fee-shifting. See H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977) ("In adopting this provision concerning fees, the committee intended to meet the requirement for specific authorization imposed by 28 U.S.C. sec. 2412 and by the Supreme Court's ruling in *Alyeska* ***."). But Congress' decision to subject the government to attorneys' fee awards under Section 307(f) does not mean that it has consented to an award in the circumstances of this case. Nothing in the language or legislative history of Section 307(f) suggests that attorneys' fees may be assessed against the government in favor of unsuccessful suitors. It is highly unlikely that such a radical departure from both the American Rule on attorneys' fees and the general rules of construction governing waivers of sovereign immunity could have passed Congress with nary a mention, let alone a clear exposition of Congress' intent.

3. The court of appeals misinterpreted Congress' intent in enacting Section 307(f). The court concluded that Congress' decision not to employ a "prevailing party" standard in Section 307(f) necessarily meant that success on the merits was not a relevant inquiry. The government agrees that success on the merits, in the traditional sense of a favorable final judgment, is not a prerequisite for an award of fees under the statute. Nevertheless, Section 307(f)'s legislative history clearly indicates Congress' understanding that some tangible accomplishment is a prerequisite to eligibility for a fee award under the statute. There is little in the legislative history to support the court of appeals' conclusion that unsuccessful, albeit competent, litigation of novel or important issues is the sort of contribution to the administration of the Clean Air Act that Congress intended to reward with attorneys' fees.

a. Because the language of Section 307(f) does not identify what situations Congress thought might be "appropriate" for attorneys' fee awards, the court of appeals turned to the legislative history for guidance. The court erred, however, in confining its analysis to the legislative history of Section 307(f) alone. That section was not added to the Clean Air Act until 1977, and its meaning can only be determined by tracing its origins in the Clean Air Act of 1970.

In the 1970 Act, Congress authorized courts to award attorneys' fees in "appropriate" cases under Section 304(d), 42 U.S.C. (Supp. IV) 7604(d)—the so-called citizens' suit provision of the Act. That section allows citizens to bring enforcement actions directly against persons or entities alleged to be in violation of the Act or against the EPA Administrator for failure to perform a nondiscretionary duty. Congress' purpose in enacting this provision was to supplement government enforcement efforts and motivate government agencies to take

more vigorous enforcement actions themselves. As stated in the Senate Report (S. Rep. No. 91–1196, 91st Cong., 2d Sess. 36–37, 38–39 (1970)):

> Government initiative in seeking enforcement under the Clean Air Act has been restrained. Authorizing citizens to bring suits for violations of standards should motivate governmental agencies charged with the responsibility to bring enforcement and abatement proceedings.
>
> * * * * *
>
> The Committee bill would provide in the citizen suit provision that actions will lie against the Secretary for failure to exercise his duties under the Act, including his enforcement duties. The Committee expects that many citizen suits would be of this nature, since such suits would reduce the ultimate burden on the citizen of going forward with the entire action.

Thus, Congress' purpose was to enlist the aid of citizens in those situations where the government was not living up to its responsibilities. It is against this backdrop that the Senate Report's explanation of the attorneys' fees provision in Section 304(d) must be evaluated (S. Rep. No. 91–1196, *supra*, at 38) (emphasis added):

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. [11] The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging

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[11] Section 304(d) initially provided for attorneys' fee awards when the court determined that such an award would be in the "public interest." See S. 4358, 91st Cong., 2d Sess. (1970). This was the version of the bill discussed in the Senate Report. The bill was later changed to authorize fees where "appropriate." There is no legislative history, however, to suggest that Congress meant anything substantive by the change.

> abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing *legitimate actions* under this section citizens would be performing a public service and in such instances the courts should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For example, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

Congress was thus focusing on two concerns, neither of which supports the court of appeals' approach to the statute.[12] First, Congress wanted to protect prevailing defendants against the burden of having to oppose frivolous lawsuits. Second, Congress wanted to reward *legitimate* citizen suits. Although the court of appeals would apparently read "legitimate actions" as including those raising "important, novel or complex" issues (App. A, *infra*, 13a), it is clear from a careful reading of the entire passage that "legitimate actions" can only have meant *successful* actions. That is because the next sentence of the report states that fee awards should "*extend* to plaintiffs in actions which result in successful abatement but do not reach a verdict" (S. Rep. No. 91–1196, *supra*, at 38) (emphasis added). While Congress thus obviated the need for a plaintiff to "prevail" in the strictly technical sense of obtaining a judgment, it clearly did not remove the element of success in a practical sense, because a party still had to "win" in the sense of producing the desired result, albeit without a

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[12] Indeed, the first concern the "appropriate" standard was designed to deal with cuts against the award of fees in this case. Far from authorizing fees in favor of unsuccessful *plaintiffs*, the statute was designed to provide fees for successful *defendants*.

verdict. As Judge Wilkey put it in his dissent in *Alabama Power Co.* v. *Gorsuch*, *supra*, 672 F.2d at 15, 19, to be awarded attorneys' fees a party must at least not lose.[13] A fair reading of the Senate Report thus demonstrates that "abatement without final judgment" represents the limits of a court's discretion to award fees under Section 304(d) to non-prevailing plaintiffs.[14]

Although the court of appeals recognized the import of the 1970 Senate Report, it nevertheless stated that it did "not read the Report as ruling out all other instances where attorneys' fees would be appropriate"

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[13] The court of appeals' decision in *Metropolitan Washington Coalition for Clean Air* v. *District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981), is not authority to the contrary. At the time plaintiffs filed suit in that case, and for three years thereafter, the District of Columbia was in clear violation of its implementation plan under the Clean Air Act. Plaintiffs never obtained a favorable final judgment, however, because the District modified the plan, and EPA approved the revision, in such a way as to render the case moot. To the extent the court of appeals now reads this decision as sanctioning fee awards to totally unsuccessful parties (App. A, *infra*, 7a–10a), it is in error for the same reasons it erred in the present case.

[14] The report states that fee awards under Section 304(d) "extend to" situations where plaintiffs accomplish a tangible benefit short of judgment; the report does not imply that a fee award is proper when a litigant merely raises novel but unsuccessful contentions (S. Rep. No. 91–1196, *supra*, at 38). The summary "section-by-section" analysis of the Senate Report, however, states that a "court may award costs of litigation to either party whenever the court determines such an award is in the public interest without regard to the outcome of the litigation." S. Rep. No. 91–1196, *supra*, at 65. There is no elaboration on the meaning of "without regard to the outcome of the litigation" but, in light of the more complete explanation of congressional intent at page 38 of the report, there is no reason to believe that Congress intended any radical departure from the notion that awards were to be made to plaintiffs who accomplished something concrete, such as abatement of a violation, yet failed to secure a favorable final judgment.

(App. A, *infra*, 4a n.3). Against the backdrop of sovereign immunity that should have informed the court's approach, however, it was not necessary for Congress to "rule out" categories of cases; rather, Congress must clearly and affirmatively "rule in" those situations where it meant to authorize fee awards. And, at least as of 1970, there is no clear indication that Congress contemplated fee awards to totally unsuccessful litigants.[15]

b. In addition to dismissing the 1970 Senate Report on the grounds that it did not "rule out" (App. A, *infra*, 4a n.3) the court's construction, the court of appeals held that it must focus its attention on the legislative history of the 1977 amendments, which added an "appropriate" attorneys' fee provision to Section 307 of the

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[15] The court of appeals was concerned (App. A, *infra*, 11a) with constructing a definition of "appropriate" that would go beyond the "prevailing party" standard that Congress had employed in other statutes, such as the Civil Rights Act of 1964, 42 U.S.C. 2000a–3, and the Civil Rights Act of 1968, 42 U.S.C. 2000e–5. However, the court of appeals overlooked the fact that as of 1970, the first time Congress employed the "appropriate" standard, the courts were narrowly construing "prevailing" to include only those parties that had obtained a favorable final judgment. It was not until 1976, for example, that courts began awarding attorneys' fees to civil rights plaintiffs who "prevailed" by means of a settlement rather than a litigated judgment. See, *e.g.*, *Foster* v. *Boise-Cascade, Inc.*, 420 F. Supp. 674 (S.D. Tex. 1976); *Richardson* v. *Civil Service Commission of New York*, 420 F. Supp. 64 (S.D.N.Y. 1976); *Parker* v. *Mathews* 411 F. Supp. 1059 (D.D.C. 1976); *Clanton* v. *Allied Chemical Corp.*, 409 F. Supp. 282 (E.D. Va. 1976). Thus, Congress' desire to reward parties whose litigation efforts had in fact achieved the result sought, albeit without a judgment, necessitated the adoption of some standard other than the "prevailing party" standard. The court of appeals thus erred in concluding (App. A, *infra*, 5a n.3, 11a) that if Congress had only meant to reward tangible accomplishments, it would not have drafted a new standard.

Act (App. A, *infra*, 4a–6a). The court, however, ignored the motivation behind Congress' 1977 amendment of Section 307.

In 1970, Congress had made no provision for awards of attorneys' fees in actions brought under Section 307, which provides for direct review in the courts of appeals of the Administrator's actions in promulgating regulations and approving state implementation plans. In *Natural Resources Defense Council, Inc.* v. *EPA*, 484 F.2d 1331 (1st Cir. 1973), the court was confronted with a request for attorneys' fees in an action brought under Section 307. The court found that Section 304, which permits suits against the Administrator for failure to perform a nondiscretionary duty, aptly covered the case before it, where the essence of the claim was that the Administrator failed to perform his duty with respect to the review and approval of state implementation plans. The court's problem, however, was that Section 304 citizens' suits may only be brought in district courts, while the case before it had to be filed in the court of appeals under Section 307. Using somewhat questionable logic, the court concluded that Section 307 did no more than specify the forum, and that a suit brought under Section 307 was really an action pursuant to Section 304. Accordingly, the court concluded that Congress had given the necessary authorization for an award of attorneys' fees in actions brought under Section 307. 484 F.2d at 1335–1338.

This conclusion was subsequently rejected by the Courts of Appeals for the Fifth and District of Columbia Circuits. *Natural Resources Defense Council, Inc.* v. *EPA*, 539 F.2d 1068 (5th Cir. 1976); *Natural Resources Defense Council, Inc.* v. *EPA*, 512 F.2d 1351 (D.C. Cir. 1975). Those courts concluded that Sections 304 and 307 contemplated distinct groups of cases and that Section 304's attorneys' fee provision could not be engrafted onto Section 307 actions.

These rulings led Congress to amend Section 307 in 1977 to include express authorization for the award of attorneys' fees in cases brought under that section whenever, as under Section 304, the court deemed such awards to be "appropriate." As the Senate Report explained (S. Rep. No. 95–127, 95th Cong., 1st Sess. 99 (1977)):

> The purpose of the amendment to Section 307 is to carry out the intent of the committee in 1970 that a court may, in its discretion, award costs of litigation to a party bringing a suit under Section 307 of the Clean Air Act.
>
> The law has been interpreted otherwise. Section 304 of the Clean Air Act specifically authorizes courts to award costs; however, section 307 did not contain a specific authorization. Courts have construed the absence of such authorization in section 307 to indicate congressional intent to prohibit a discretionary award of fees in section 307 suits.

It is thus clear that the congressional purpose behind the 1977 amendment to Section 307 was to conform that section to Section 304(d). The amendment does not reflect any change in Congress' understanding of when a fee award is "appropriate." Cf. *Northcross* v. *Memphis Board of Education*, *supra*. Thus, under Section 307, as under Section 304, a litigant must "at least not lose" in order to be eligible for a fee award. Fees are "appropriate" if a party prevails or if it accomplishes some tangible result, such as a voluntary agreement by the

Administrator to modify a regulation or adopt some other significant policy change.[16]

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[16] The legislative histories of other statutes containing provisions authorizing attorneys' fees where "appropriate" (see note 4, *supra*) are fully consistent with the government's view of the Clean Air Act. For example, the legislative history of Section 505(d) of the Clean Water Act, 33 U.S.C. 1365(d), shows that Congress specifically intended Section 505(d) to be interpreted similarly to Section 304(d) of the Clean Air Act. Indeed, the House Report simply states that fact. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 132-133 (1972). The Senate Report, S. Rep. No. 92-414, 92d Cong., 2d Sess. 81 (1972), reiterates the rationale of Section 304(d) of the Clean Air Act in language virtually identical to the Senate Report on the Clean Air Act. Thus, the twin purposes of Section 505(d) of the Clean Water Act are to punish frivolous or harassing litigants and to reward citizens' suits that result in pollution abatement but fail to reach a verdict. The legislative history of the Safe Drinking Water Act, 42 U.S.C. 300j-8(d), states that its attorneys' fee provision is designed "[as] a deterrent against frivolous suits." S. Rep. No. 93-231, 93d Cong., 1st Sess. 17 (1973). The legislative history of the attorneys' fee provision in the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. IV) 1270(d), specifically adopts the legislative history of Section 505(d) of the Clean Water Act. H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 90-91 (1977). The legislative history of the Toxic Substances Control Act's attorneys' fee provision, 15 U.S.C. 2618(d), construed by the court of appeals in *Environmental Defense Fund, Inc.* v. *EPA*, 672 F.2d 42 (D.C. Cir. 1982), is likewise fully consistent with the government's position here. Although the court of appeals relied heavily on a statement by Senator Tunney that fee awards under the TSCA would be appropriate "where such award is in the public interest without regard to the outcome of the litigation," 122 Cong. Rec. 8301 (1976), the court of appeals failed to analyze the cases Senator Tunney cited in support of that proposition. None of the four cases even remotely suggests the appropriateness of an award for litigating losing issues. Rather, in all four cases, the plaintiffs "prevailed" either in fact or by obtaining a concrete, tangible benefit for themselves or the class they represented in the form of a definite change in the defendant's conduct. *Kopet* v. *Esquire Realty Co.*, 523 F.2d 1005, 1008-1009 (2d Cir. 1975); *Parham* v. *Southwestern Bell Telephone Co.*, 433 F.2d 421, 429-430 (8th Cir. 1970); *Thomas*

c. Rather than recognizing the narrow purpose behind Congress' amendment to Section 307, the court of appeals based its entire decision on the House Report accompanying the 1977 amendments. In pertinent part, that report provides as follows (H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977)):

> The committee bill also contains express authority for the courts to award attorneys fees and expert witness fees in two situations.* The judicial review proceedings under section 307 of the act when the court determines such award is appropriate [sic].
>
> In the case of section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1388 [sic] (1st Cir. 1973).

*Such fees are already authorized to be awarded in suits brought under Section 304 of the Act.

The court of appeals ruled that whatever the policy behind Section 304 attorneys' fees actions this language

v. *Honeybrook Mines, Inc.*, 428 F.2d 981, 985 (3d Cir. 1970); *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338 (D. Or. 1969). The court of appeals in *Environmental Defense Fund, Inc.* also glossed over Senator Tunney's statement that "the court should follow prevailing case law which holds that a *successful* plaintiff 'should ordinarily recover an [sic] attorneys' fees' * * *" (122 Cong. Rec. 8300 (1976) (emphasis added)).

"shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions to the statutory goals of the Act" (App. A, *infra*, 4a–5a, n.3). Close examination of the House Report, however, reveals several flaws in the court's reasoning.

First, the initial paragraph, like the 1977 Senate Report, shows only an intent to have Section 307 parallel the existing attorneys' fee provision in Section 304. Second, the next paragraph quite clearly limits itself to actions under Section 307, and does not speak to Section 304 actions. It would be curious indeed if Congress really meant to adopt a "far broader policy" for Section 307 actions; indeed, such a result cannot be squared with the Senate Committee's explanation of the need to amend Section 307 simply to bring it into harmony with Section 304. S. Rep. No. 95–127, *supra*, at 99. Cf. *Northcross* v. *Memphis Board of Education*, *supra*. Yet the result of the court of appeals' ruling is that Section 307 litigants need not accomplish anything tangible in order to recover attorneys' fees, while Section 304 litigants must at a minimum achieve some tangible result short of judgment. Finally, the House Committee's language about encouraging "proper implementation of the act" does not suggest that unsuccessful litigation contributes to proper implementation. To the contrary, litigation that promotes "proper implementation of the act" is quite obviously akin to the "legitimate actions" contemplated by Congress in 1970. See S. Rep. No. 91–1196, *supra*, at 38, at page 18, *supra*.

Since the language of the House Report itself does not support an award of attorneys' fees to unsuccessful litigants, it is necessary to analyze the First Circuit's decision in *Natural Resources Defense Council, Inc.* v. *EPA*, upon which the House Committee "largely" relied (H.R. Rep. No. 95–294, *supra*, at 337). Again, a close reading of the case does not support the conclusions reached by the court below. The primary issue in

National Resources Defense Council, Inc. v. *EPA* was whether fees could *ever* be awarded to a Section 307 litigant since, at the time of the decision, Section 307 did not explicitly authorize fee awards. See page 21, *supra*. Only after resolving that question in NRDC's favor did the court turn to a brief examination of the "appropriateness" of a fee award. On this issue, the court was faced with a very narrow question—should it award *any* fees where the petitioners had prevailed on most but not all of the claims they had raised. In resolving this issue, the court turned to the legislative history of Section 304(d) which, as we have noted, contemplates awards to successful plaintiffs or to plaintiffs who accomplish something concrete short of judgment. Against this backdrop, the court stated (484 F.2d at 1338) (emphasis added):

> We are not impressed by the government's argument that because *some* issues were decided adversely to petitioners each party should bear its own costs. * * * We are at liberty to consider not merely "who won" but what benefits were conferred. The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered [sic] dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself novel and complex. Given the implementation dates, its early interpretation is desirable. It is our impression, overall, that petitioners, in their watchdog role, have performed a service.
>
> Were we to believe that the litigation were wholly or in substantial part frivolous, we would not, of course, award costs of any description to petitioners. In such cases, indeed, we reserve the right to award costs and fees in favor of the EPA. But the challenges here, even those not sustained,

were mainly constructive and reasonable. *And petitioners were successful in several major respects; they should not be penalized for having also advanced some points of lesser weight.*

Thus, on its face, the First Circuit's opinion is far narrower than the court of appeals here suggested. NRDC *won* major portions of its case; nothing in the First Circuit's opinion suggests that fees would still have been awarded had NRDC failed to prevail on a single issue. The court's dictum about petitioners' "watchdog" role cannot be considered in isolation; rather, it must be examined in light of the government's contention that because NRDC lost *some* issues it should be denied *any* fee award. 484 F.2d at 1338. Only in this limited sense can the First Circuit be said to have rejected a "prevailing party" standard,[17] and there is nothing in the 1977 House Report's citation to *NRDC* v. *EPA* to suggest that it meant to go beyond this holding.

In short, the court of appeals has adopted an erroneous standard unsupported by the plain language of Section 307(f) or its legislative history. The case has worked a virtual revolution in the traditional law of attorneys' fees, in purported reliance on congressional intent. It is unlikely, however, that such a revolution would have occurred in Congress without anyone noticing it. In light of the guiding principles of sovereign immunity and the general presumption against fee awards to unsuccessful litigants, Congress clearly has not spoken in the certain and unequivocal terms required to support the court of appeals' decision.[18]

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[17] Moreover, at the time of the First Circuit's supposed rejection of a "prevailing party" standard, that standard was still being narrowly construed by the courts. See note 15, *supra*.

[18] The court of appeals also overlooked the fact that Congress has in fact spoken clearly when it meant to award attorneys' fees for the mere presentation of views. In Section 6(c)(4)(A) of the Toxic Substances Control Act, 15 U.S.C. 2605(c)(4)(A), Congress authorized EPA to award reasonable attorneys' fees to

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1982

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persons participating in rulemaking proceedings under the Act. That statute clearly demonstrates that Congress knew how to draft language awarding fees for the mere presentation of issues and viewpoints, whether or not those viewpoints were ultimately adopted. Under the statute, a rulemaking participant may be awarded fees if that participant "represents an interest which would substantially contribute to a fair determination of the issues to be resolved in the proceeding." 15 U.S.C. 2605(c)(4)(A)(i). In deciding what persons represent such an interest, EPA is to take into account "the number and complexity of such issues and the extent to which representation of such interest will contribute to widespread public participation in the proceeding and representation of a fair balance of interests for the resolution of such issues." 15 U.S.C. 2605 (c)(4)(A). Clearly, these statutory directives make it appropriate for EPA to compensate persons whose contribution to the public interest lies simply in adding to the variety of public debate on an issue. Nothing remotely comparable can be read into the "appropriate" standard at issue in this case.

It is also worth noting that the same Congress that passed Section 307(f) of the Clean Air Act refused to pass a portion of the 1978 Nuclear Regulatory Commission appropriations bill that would have expressly provided for attorneys' fees for unsuccessful proponents of worthy causes before the NRC. Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947 *et seq.*, discussed in H.R. Rep. No. 95-1089 (Pt. 2), 95th Cong., 2d Sess. 2-3, 22-24 (1978). The rejected section, Section 275(a), appears at pages 2-3 of that House Report.

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

NATIONAL COAL ASSOCIATION
ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213, and 80–1338

On Motion for Award of Attorneys' Fees

Decided February 5, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*.

Opinion *Per curiam*.

PER CURIAM: The Sierra Club and the Environmental Defense Fund ("EDF"), petitioners in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981) (hereinafter *Sierra Club*), seek an award of attorneys' fees for their participation in an unsuccessful appeal of certain Environmental Protection Agency ("EPA") regulations, 44 Fed. Reg. 33580 (June 11, 1979), promulgated pursuant to the Clean Air Act, 42 U.S.C. §§ 7301 *et seq.* (1979

Supp. III). We find that under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), this is an "appropriate" case for the court to award attorneys' fees.

Prior to August, 1981 (when EPA apparently adopted a policy of blanket opposition to all petitions for attorneys' fees by non-prevailing parties[1]), Sierra Club and EDF were actively engaged in negotiations with EPA over the amount of attorneys' fees. Therefore, we hold here only that attorneys' fees may be awarded to nonprevailing parties under Section 307(f) and that such an award to Sierra Club and EDF in this case is appropriate, and we suggest that the parties resume their negotiations over the amount. If settlement proves impossible, the parties may return here for resolution of this matter.[2]

I. Authority Under Section 307 (f) to Grant Attorneys' Fees to Non-Prevailing Parties

Section 307(f) of the Clean Air Act provides that

> In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) *whenever it determines that such an award is appropriate.*

42 U.S.C. § 7607(f) (emphasis added). An award of attorneys' fees under the Clean Air Act is not limited to "substantially prevailing" parties. *Compare* 42 U.S.C. § 7607(f) *with* 5 U.S.C. § 552(a)(4)(E) (awards in FOIA cases available only to a complainant who has substantially prevailed). On its face, the statutory provision

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[1] *See* Affidavit of David J. Lennett (September 22, 1981).

[2] *See* Response For The United States To The Sierra Club's Amended Request For Attorneys' Fees (government support for this approach); *cf.* United States v. American Telephone and Telegraph Co., 551 F.2d 384, 394 (D.C. Cir. 1976) (where this court suggested that the parties resume negotiation because of the recognized difficulty of appellate court resolution).

clearly permits the court to award attorneys' fees to prevailing, substantially prevailing, or non-prevailing parties in "appropriate" cases.

The legislative history of section 307(f) confirms this reading and offers guidance in identifying "appropriate" cases. The House Report, H.R. Rep. No. 95–294, 95th Cong., 1st Sess. 337 (1977), *reprinted in* 1977 U.S. Cong. & Adm. News 1077, 1416, states:

> In the case of the section 307 judicial review litigation, the purposes of the authority to award fees are not only to discourage frivolous litigation, but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest. The committee did not intend that the court's discretion to award fees under this provision should be restricted to cases in which the party seeking fees was the "prevailing party." In fact, such an amendment was expressly rejected by the committee, largely on the grounds set forth in *NRDC* v. *EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973).[3]

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[3] Although adding little to our understanding of legislative intent, the Senate Report, S. Rep. No. 95–127, 95th Cong., 1st Sess. 99 (1977), also confirms our reading:

> Courts may award reasonable attorneys fees to any party against whom EPA acts unreasonably in initiating an enforcement action. Attorneys fees and other costs may also be awarded in judicial review proceedings brought under section 307 of the Clean Air Act whenever the court determines that such an award is appropriate.

The passage explicitly sanctions awards when EPA (1) acts unreasonably in initiating an enforcement action, and (2) when the court otherwise determines that an award is appropriate.

The government has suggested that the legislative intent of section 307(f) cannot be gleaned by working with the 1977 legislative records only. It argues that section 307(f) was meant to parallel section 304(d) of the Clean Air Act, and so the legislative history of that provision too must be consulted. The pur-

The passage from Judge Campbell's opinion in *National Resources Defense Council* v. *Environmental Protection Agency*, 484 F.2d 1331, 1338 (1st Cir. 1973) (hereinafter *NRDC*), endorsed in the House Report, reads:

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pose of section 304(d), the government notes, was to punish "frivolous or harassing litigation, and [to reward] citizens suits which result in pollution abatement, but fail to reach a favorable verdict." Reply Brief For The United States On The Issue Of Attorneys' Fees For Losing Parties Under 42 U.S.C. 7607(f) at 8. In support, the government cites S. Rep. 91-1196, 91st Cong., 2d Sess. 38 (1970), which states:

> Concern was expressed that some lawyers would use section 304 to bring frivolous and harassing actions. The Committee has added a key element in providing that the courts may award costs of litigation, including reasonable attorney and expert witness fees, whenever the court determines that such action is in the public interest. The court could thus award costs of litigation to defendants where the litigation was obviously frivolous or harassing. This should have the effect of discouraging abuse of this provision, while at the same time encouraging the quality of the actions that will be brought.
>
> The Courts should recognize that in bringing legitimate actions under this section citizens would be performing a public service and in such instances the court should award costs of litigation to such party. This should extend to plaintiffs in actions which result in successful abatement but do not reach a verdict. For instance, if as a result of a citizen proceeding and before a verdict is issued, a defendant abated a violation, the court may award litigation expenses borne by the plaintiffs in prosecuting such actions.

While the only example of a non-prevailing party awarded attorneys' fees expressly cited in the Report is one where the case was mooted by abatement, we do not read the Report as ruling out all other instances where attorneys' fees would be appropriate. And, in any case, we cannot disregard the clear legislative history *specific* to section 307, noted in the text. *See* pp. 4–6 *infra*. That history shows that Congress in 1977 specifically adopted the far broader policy of rewarding substantial contributions

> The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and uncharted dimensions, there are roles for both the official agency and a private watchdog. The legislation is itself complex and novel. Given the implementation dates, its early interpretation is desirable.

For Judge Campbell, and apparently for Congress, it was not enough merely to consider "who won." The

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to the statutory goals of the Act. In 1977 Congress made a clear choice between two different attorneys' fees provisions. *Compare* S. 252 ("In any judicial proceeding under this Act in which the United States ... is a party ... any party other than the United States *which prevails* in such action shall recover ... reasonable costs ... including reasonable attorneys' fees. ... In any case in which such party *prevails in part*, the court shall have discretion to award such reasonable costs." (Emphasis added.)) *with* S. 253 ("In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever it determines that such award is appropriate."). *Reprinted in* 5 A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, 3644, 3817 (1978) (hereinafter LEGISLATIVE HISTORY). During Congressional hearings, areas of controversy on the issue of attorneys' fees included questions about whether there was any need to modify existing judicial practice and whether awards ought to be based on need rather than on the judicial disposition of the suit. *Id.* at 3893.

This legislative history makes it difficult to escape the conclusion that the statutory goals of the Clean Air Act can be furthered by parties who make a substantial contribution to the interpretation and development of the Act, *see* pp. 12–13, *infra*, as well as by substantially prevailing parties and parties who win a favorable result other than by receiving a favorable verdict. *See* pp. 10–13 *infra*.

benefits conferred by the litigation were an equally important consideration.[4]

The government here seeks to distinguish *Sierra Club* from *NRDC*, and thereby to pull this case beyond the purview of the plain language and the intent of the statutory provision, by arguing that the party awarded attorneys' fees in *NRDC* prevailed on *some*, although not on all issues. *See* Brief For The United States On The Issue of Attorneys' Fees For Losing Parties Under 42 U.S.C. 7607(f) at 11. The passage from *NRDC* reprinted above cannot, however, be read so narrowly. It indicates that the relevant inquiry is whether the lit-

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[4] *NRDC* at 1338. *See also* Delaware Citizens For Clean Air Inc. v. Stauffer Chemical Company, 62 F.R.D. 353, 355 (D. Del. 1974):

> [I]t is fair to conclude from the language chosen by Congress that ultimate success in a citizen's suit was not intended to be a prerequisite to an award. At the same time, however, in light of the absence of any more specific declaration of congressional intent, I believe that "appropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this Court that success or failure must be given substantial weight and that an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor. The exercise of the equitable judgment thus called for must be made in light of all the actions of both parties during the course of litigation as well as during the relevant preceding period.

In considering the "appropriateness" of an award, the court also inquired into plaintiff's motives in bringing the suit and whether the suit was substantial or frivolous. It is thus clear that when Congress enacted the "appropriateness" standard in 1977, it was not surveying an empty field.

igation—successful or not—furthered the goals of the Act. It was this general policy which Congress sought to codify in the 1977 Amendments of the Clean Air Act.[5]

Our reading of the legislative history is supported by recent decisions of this court and the district court for the District of Columbia. In *Metropolitan Washington Coalition for Clean Air* v. *The District of Columbia*, 639 F.2d 802 (D.C. Cir. 1981) (hereinafter *Washington Coalition*), this court reversed a decision of the district court, which, although acknowledging that unsuccessful parties may be awarded attorneys' fees under the Clean Air Act, found no public benefit from the lawsuit because the challenged operation of a municipal incinerator was ultimately determined not to endanger public health. The district court also found that the suit had "questionable legitimacy" because EPA was already considering revisions of the District of Columbia implementation plan and therefore the non-prevailing party's efforts "did not serve to expedite the Administrator's decision." This court reversed and remanded because:

> the District court incorrectly focused its attention on the outcome and practical effects of the litigation, to the exclusion of a more relevant consideration: whether the suit was of the type that Congress intended to encourage when it enacted the citizen-suit provision. ... Quite obviously, the legislature, when it called for citizen-suits, considered a fee recovery to be consonant with the public interest whenever the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act. The attorneys' fee feature was of-

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[5] Further, it should be noted that in *Sierra Club* the agency's response to several challenges asserted by the utilities was effectively supplemented by the efforts of the environmental groups. *See* pp. 15–18 *infra*.

> fered as an inducement to citizen-suits, which Congress deemed necessary; and if the hope Congress had for such suits is to become a reality, decisions of fee allowance cannot make wholesale substitutions of hindsight for the legitimate expectations of citizen plaintiffs.

Id. at 804. It is true that in *Washington Coalition* we noted that at the time the suit began there may have been "a well founded expectation that the suit would bring about a more timely compliance with the [implementation] plan, and in that fashion an observance of the [Clean Air] Act." *Id.* at 805. The government therefore suggests that we read *Washington Coalition* to permit awards of attorneys' fees to "non-prevailing parties" only in those situations where, except for intervening events, the litigation would have been successful. Although the government's reading is snugly fit to the facts of *Washington Coalition*, that reading is not properly tailored to the case's rationale. We find the rationale of *Washington Coalition* to be broad enough to cover a case like *Sierra Club* where the non-prevailing parties had a "well-founded expectation" of success when their suit was brought—the issues were not frivolous but substantial—and where the appeal furthered the goals of the Act by facilitating the prompt resolution of the important and complex issues confronting this court involving the Act's interpretation. Moreover, by assisting judicial interpretation of the Clean Air Act, Sierra Club and EDF aided agency implementation and Congressional reevaluation[6] of the Act.

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[6] *See* 42 U.S.C. § 7626. Congress is presently considering revisions. *See, e.g.*, H.R. 1431, 97th Cong., 1st Sess. (1981); *see generally*, L. LAVE & G. OMENN, CLEARING THE AIR: REFORMING THE CLEAN AIR ACT (1981); E. HASKELL, THE POLITICS OF CLEAN AIR: EPA STANDARDS FOR COAL-BURNING POWER PLANTS (1982); Pedersen, *Why The Clean Air Act*

Our decision in *Washington Coalition* took note of Judge Richey's opinion in *Citizens Association of Georgetown* v. *Washington*, 383 F. Supp. 136 (D.D.C. 1974), *rev'd on other grounds*, 535 F.2d 1318 (D.C. Cir. 1976) (hereinafter *Citizens Ass'n*). The issue presented there was "whether Plaintiffs, who were unsuccessful in a suit brought under the Clean Air Act, 42 U.S.C. §§ 1857 *et seq.*, should be awarded costs and attorneys' fees." *Id.* at 143. After trial, the district court concluded that the plaintiffs had not successfully proved a violation of the Act. Nevertheless, understanding Congress to have intended courts to award attorneys' fees in appropriate cases to unsuccessful as well as successful parties, the district court granted plaintiffs' request because the litigation had furthered the Act's purpose of encouraging citizen suits to accelerate enforcement of the Clean Air Act. In support of its holding the court noted that the case was one of first impression in the circuit, extensive preparation was required, nonfrivolous claims were raised, and the suit was brought in the face of a clean air regulatory vacuum in the District of Columbia.[7]

Works Badly, 129 U. Pa. L. Rev. 1059 (1981). On the status of the revisions see N.Y. Times, Jan. 4, 1982 at B–8.

[7] *Id.* at 145. More recently, District Judge Robinson granted attorneys' fees to unsuccessful plaintiffs who had brought suit under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, and the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331 *et seq.* North Slope Borough v. Andrus, 515 F. Supp. 961 (D.D.C. 1981). (The case is presently before this court on appeal.) Both ESA, 16 U.S.C. § 1540(g)(4), and OCSLA, 43 U.S.C. § 1349(a)(5), contain attorneys' fees provisions virtually identical to the one contained in the Clean Air Act. 16 U.S.C. § 1540(g)(4) provides:

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and ex-

It is clear from the foregoing review that whether Sierra Club and EDF are entitled to attorneys' fees turns not on whether they have prevailed in whole or in part,

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pert witness fees) to any party, whenever the court determines such award is appropriate.

43 U.S.C. § 1349(a)(5), provides, in relevant part:

> A court, in issuing any final order in any action brought pursuant to subsection (a)(1) or subsection (c) of this section, may award costs of litigation, including reasonable attorney and expert witness fees, to any party, whenever such court determines such award is appropriate.

The district court had found violations of both ESA and NEPA, but not OCSLA, and had determined that an award of attorneys' fees was appropriate. This court reversed, finding no statutory violations. North Slope Borough v. Andrus, No. 80–1148 (D.C. Cir. October 9, 1981). The attorneys' fees award was neither challenged in nor disturbed by this court. Thereafter, the parties entered into negotiations over the amount of the award. On January 21, 1981, a Stipulation of Settlement was filed, but before court approval, it was withdrawn. On February 3, 1981, the district court, after listening to essentially the same arguments presented here, reaffirmed its ruling that plaintiffs were entitled to attorneys' fees. North Slope Borough v. Andrus, 507 F. Supp. 106 (D.D.C. 1981). Judge Robinson observed:

> The "appropriateness" of an attorneys' fees award is determined by analyzing whether "the underlying suit was a prudent and desirable effort to achieve an unfulfilled objective of the Act." The appropriateness of a fee award may thus be viewed on a continuum—some suits will reflect more "prudent and desirable effort[s]" than others. . . . Denial of an award of attorneys' fees in this action would throw the issue of entitlement under the applicable statutes completely into disarray. In fact, denial of a fee award could only be supported by the application of the "substantially prevailing party" standard. This would require amending the ESA and the OCSLA, a task beyond the power of the Court. The Court once again affirms Plaintiffs' entitlement to attorneys' fees.

North Slope Borough v. Andrus, 515 F. Supp. at 965 (footnotes omitted).

but on whether they have served the goals of the Clean Air Act. The government's current position, that non-prevailing parties are not entitled to attorneys' fees, conflicts with the language and history of section 307 and judicial precedent. Under the government's position, there would have been no need to abandon the "substantially prevailing" standard commonly used to guide judicial awards of attorneys' fees. *See* p. 3 *supra;* n.8 *infra*. Clearly Congress meant something more by the provision in the Clear Air Act: it intended to encourage the participation of "public interest" groups in resolving complex technical questions and important and difficult questions of statutory interpretation, and in monitoring the prompt implementation of the Act.

We hasten to alleviate the government's concern that because implementation of the Clean Air Act is so complex, no challenge will appear frivolous and so all non-prevailing parties will automatically be awarded attorneys' fees. We believe that courts confronted with complex cases will be able to distinguish appropriate

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For a similarly worded statutory provision, see the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2618(d):

> The decision of the court in an action commenced under subsection (a), or of the Supreme Court of the United States on review of such a decision, may include an award of costs of suit and reasonable fees for attorneys and expert witness if the court determines that such an award is appropriate.

Environmental Defense Fund v. Environmental Protection Agency, Nos. 79–1811 & 79–1816 (D.C. Cir. Feb. 5, 1982), interprets this provision in a manner consistent with this opinion. *See also,* Deep Seabed Hard Minerals Resources Act, 30 U.S.C. § 1427(c); Clean Water Act, 33 U.S.C. §§ 1365(d), 1415(g)(4), 1515(d), Safe Drinking Water Act, 42 U.S.C. § 300j8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d).

cases.[8] In this case, although the parties awarded fees did not *substantially prevail*, they did *substantially contribute* to the goals of the Act: the issues they ad-

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[8] Thus even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the Clean Air Act may not be entitled to attorneys' fees. In this respect, the "substantially contributing" standard of the Clean Air Act resembles the "substantially prevailing" standard of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(a)(4)(E), which provides:

> The court *may* assess against the United States reasonable attorney fees and other costs *reasonably incurred* in any case under this section in which the complainant has *substantially prevailed*.

(Emphasis added.) FOIA presents two questions for courts determining whether to award fees and costs: (1) is the plaintiff *eligible* for an award, and (2) is the plaintiff *entitled* to an award. Fund for Constitutional Government v. National Archives and Records Service, 656 F.2d 856, 870 (D.C. Cir. 1981); Church of Scientology v. Harris, No. 80–1189 (D.C. Cir. April 17, 1981) (hereinafter *Harris*), slip op. at 8; Cox v. U.S. Dept. of Justice, 601 F.2d 1, 6 (D.C. Cir. 1979) (hereinafter *Cox*). To be eligible for an award under FOIA, the plaintiff must demonstrate (1) that the prosecution of the action could be reasonably regarded as necessary, and (2) that the action had a substantial causative effect on the delivery of the documents. *Harris* at 8, 11; *Cox* at 6. Determination of whether a plaintiff is entitled to an award is, nowever, within the sound discretion of the court. *See Harris* at 13 ("the decision as to whether to award fees and costs to an eligible party rests in the sound discretion of the district court."); Fenster v. Brown, 617 F.2d 740, 742 (D.C. Cir. 1979) ("Congress, in authorizing the award of attorneys' fees, left to the traditional equitable discretion of the courts the decision whether such fees are appropriate in any given disclosure case."); *Cox* at 7 ("A decision on whether to award attorneys' fees to an eligible party resides in the discretion of the district court . . ."); Nationwide Building Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C. Cir. 1977) ("The touchstone of a court's discretionary decision under section 552(a)(4)(E) must be whether an award of attorney fees is necessary to implement

dressed were important, complex and novel; their assistance in the resolution of the issues was substantial and not duplicative of the efforts of other parties; and the caliber of their written and oral presentations was exemplary. While the occasions upon which non-prevailing parties will meet such criteria may be exceptional, *see American Petroleum Institute v. Costle*, No. 79–1104 (D.C. Cir. October 27, 1981) (denial of request for attorneys' fees), *Sierra Club* is such an occasion.

II. The Appropriateness of an Award of Attorney's Fees

A. *The Importance of the Case and the Issues Involved*

Sierra Club v. *Costle* was a significant case involving an EPA rule governing sulfur dioxide and particulate emissions from fossil-fueled electric utility plants across the nation. We described its impact in our opinion as follows:

> The importance of the challenged standards arises not only from the magnitude of the environment and health interests involved, but also from the critical implications the new pollution controls have for the economy—at the local and national levels. Further heightening the significance of this controversy is the crucial role coal burning power

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FOIA."); Cuneo v. Rumsfeld, 553 F.2d 1360, 1365 (D.C. Cir. 1977) ("Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees." (Footnotes omitted.)). As in the case of FOIA, by enacting the attorneys' fees provision of the Clean Air Act, Congress has given courts broad discretion. *See* Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 262 (1974) ("the circumstances under which attorneys' fees are to be awarded *and the range of discretion of the courts in making those awards* are matters for Congress to determine." (Footnote omitted; emphasis added.)).

plants are expected to play in our nation's effort to cope with the problems associated with energy scarcity.[8]

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[8] The significance of this case is reflected to some degree in a spate of recent articles. *See* Ackerman & Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 Yale L.J. 1466 (1980). Ackerman and Hassler's article appears in expanded form as a book entitled *Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High Sulfur Coal Producers and What Should Be Done About It* (Yale Univ. Press 1981); Banks, *EPA Bends to Industry Pressure on Coal NSPS—and Breaks*, 9 Ecology L.Q. 67 (1980); Currie, *Direct Federal Regulation of Stationary Sources Under the Clean Air Act*, 128 U. Pa. L. Rev. 1389 (1980); Navarro, *The Politics of Air Pollution*, Public Interest, Spring 1980, 36–44; *see also New Source Performance Standards for Coal-Fired Power Plants*, 8 Ecology L.Q. 784 (1980); *Reconciling Coal Conversion Policy and Significant Deterioration of Air Quality*, 15 Tulsa L.J. 532 (1980).

See generally Report of the National Commission on Air Quality, *To Breathe Clean Air* (1981); Del. Duca, *The Clean Air Act: A Realistic Assessment of Cost Effectiveness*, 5 Harv. Env. L. Rev. 184 (1981); Smith, *The Fight Over Clean Air Begins*, SCIENCE, March 20, 1981. 1328–30.

Sierra Club, 657 F.2d at 313. Our assessment of the case's importance to the national welfare was shared by all parties in the case.[9] The technical complexity of the

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[9] *See, e.g.*, EPA Brief at 5–6 ("this regulation will reduce sulfur dioxide emissions by half, particulate matter emissions by 70 percent ... New coal-fired plants will be several times cleaner than existing plants ... These benefits will cost billions ... In addition, the ... standard ... will prod the development of a technology that is cheaper, more reliable, more energy efficient, less water demanding and more environmentally sound overall."); Brief for Intervenor-Respondent National Coal Association at 4 ("The Standards have a major impact on the type and quality of coal which can be used by new generating plants, as

case necessitated extensive preparation by the parties and the court. In formulating the regulation, EPA had prepared 120 studies, collected 400 items of reference literature, received almost 1,400 comments, written 650 letters and 200 interagency memoranda, held over 50 meetings and substantive telephone conversations with the public, and conducted four days of public hearings. The statement accompanying the regulation took up to 43 triple columns of single-spaced type. Approximately 700 pages of briefs were submitted to this court on the merits of the case. The joint appendix contained 5,620 pages, bound in twelve volumes. The certified index to the record listed over 2,520 submissions. Seven months after oral argument, this court emerged with a 250 page opinion upholding the agency's regulations.

Among the serious questions presented or addressed by Sierra Club and EDF in the appeal were: (1) Whether section 111 of the Clean Air Act as amended in 1977 authorized EPA to promulgate a variable percentage

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well as on the marketability and competitive position of coal compared to other fuels. In some cases the Standards also have a significant bearing on methods of mining and processing coal."); Appalachian Power Co. Brief at 59 ("If Electric Utilities are correct that compliance with the 90 percent standard entails substantial risks, a large percentage of the coal reserves in Illinois, Indiana, Western Kentucky, Ohio and West Virginia may be eliminated as a boiler fuel. In addition, fewer new coal fired plants may be built as a result of the disincentives to high sulfur coal use. Finally, if fewer plants are built, additional emissions and oil consumption will result from increased reliance on older coal and oil-fired plants."); Brief of Intervenor Missouri Association of Municipal Utilities at 10. ("The establishment of a variable standard makes the use of dry technology economically feasible at the stage of implementation of the technological control requirement. . . . [R]elatively small utilities, such as the municipal systems which make up MAMU, will be able to continue use of locally available medium sulfur coal at a much more reasonable cost to their customers.").

reduction standard rather than a uniform reduction standard, and if so whether variability could be based upon the sulfur content of the coal burned. (*Sierra Club* provided the first major occasion for judicial interpretation of this newly revised provision in the 1977 Amendments to the Clean Air Act, and so demanded not only a microscopic examination of the legislative history but also a detailed review of the practical effects of a variable standard.) (2) Whether a variable standard could be issued in order to encourage new technology, *i.e.*, dry scrubbing. (This issue required extensive analysis of the record, as well as statutory interpretation of the relationship among several newly amended sections of the Clean Air Act.) (3) Whether EPA's econometric computer model, used to forecast the future impacts of alternative standards, was reliable, and whether the assumptions underlying the model were valid. (Our ruling on this question will inevitably affect agency procedures in a number of substantive contexts.) (4) Whether a 90% reduction of sulfur dioxide was technologically feasible. (A challenge to feasibility was brought by the utilities and defended by the environmental groups as well as EPA.) (5) Whether EPA's adoption of a 1.2 lbs./MBtu emissions ceiling was procedurally defective because of post-comment period contacts. (This was the first comprehensive judicial application of section 307(d) of the Clean Air Act, which legislated a complete set of guidelines for rulemaking under that Act.) None of these issues was remotely frivolous; all deserved to have been aired, and having been aired will contribute both to the agency's future efforts to implement the Clean Air Act and to Congress' ongoing review of the Act.

B. *The Substantial Nature of the Petitioners' Assistance*

Although it seems almost inconceivable that a major

review of the rule could have been conducted without questioning EPA's authority and evidentiary basis for promulgating a variable percentage reduction standard, an issue that the EPA Administrator had referred to at the start of the rulemaking as the "main" issue in the proceeding, Sierra Club was the only party to raise it. The court was thus totally dependent upon Sierra Club to brief and advocate the opposition to a variable standard. Without Sierra Club, an issue conceded by EPA to be critically important would not have been raised or decided during the first judicial challenge to the statutory provision. The absence of debate on the issue, moreover, could have affected the outcome of other related issues in the case, *e.g.*, the proper level of total emissions (the so-called 1.2 lb./MBtu standard), since individual standards of section 111 operate interdependently. And the argument pressed most intensely by the utilities, that a 90% reduction in sulfur emissions was technologically infeasible given the state of antipollution technology, would have been far less completely aired without Sierra Club's participation. The various parts of a complex rule like this one do not travel alone, and the court's education on each part of the rule informed its decisions on other parts.

Similarly, the critical role played by EDF in the court's premier interpretation of the new rulemaking procedures laid down in the 1977 Amendments must be recognized. This first comprehensive judicial interpretation of section 307(d) of the Clean Air Act consumed 60 pages of the court's opinion and involved detailed challenges to several facets of the rulemaking. EDF's contribution involved factual research into meetings and communications between agency officials, White House personnel, members of Congress and industry representatives, as well as a legal analysis of the propriety of such meetings under the new section 307 and existing case law on *ex parte* contacts in rulemaking.

Several documents pertaining to these contacts, proffered by EPA for the first time on appeal, were consulted by the court. *See Sierra Club*, 657 F.2d at 389–90 n.450; *cf. Citizens Ass'n*, 383 F. Supp. at 145 (benefits from public exposure). We have little doubt that without EDF's substantial contribution to this aspect of the case, our deliberations would have been less enriched and more time consuming. We note too that EDF's procedural challenges not only clarified how the new section 307(d) would operate, but apparently provided fuel for discussion about appropriate restrictions on *ex parte* comments in other administrative proceedings. *See* Stockman Memorandum For Heads of Executive Departments and Agencies 2 (June 13, 1981). Again, it was EDF's challenge that instigated the first major judicial inquiry into how section 307's rulemaking procedures would operate—a review that was necessary in order to resolve close questions of interpretation for future rulemaking under the Act.

C. *Conclusion*

In conclusion, we find that the express goals of the Clean Air Act—prompt resolution of serious questions of statutory interpretation and citizen participation in monitoring administration of the Act through enforcement suits—require that substantial contributions to significant litigation in furtherance of these goals be compensated. It was absolutely essential in a case of this dimension that this court have expert and articulate spokesmen for environmental as well as industrial interests. The rulemaking process not only involved highly technical and complex data, but controversial considerations of public policy. Given the complexity of the subject matter, without competent representatives of environmental interests, the process of judicial review might have been fatally skewed.

The questions raised by Sierra Club and EDF needed to be resolved; yet no other party had a sufficient eco-

nomic interest at stake to represent them. Sierra Club and EDF were required to expend great efforts to perform their advocacy tasks well in matters of such technical complexity; their contribution to the court's prompt disposition of all issues raised in the case was substantial. As Congress recognized in enacting the citizen suit/cost provision of section 307, one cannot expect that contributions as substantial as those made by Sierra Club and EDF would be made by public interest groups without some form of compensation.

III. Instructions To The Litigants

We postpone consideration of the amount of compensation to be awarded in order to allow the parties to resume their abruptly ended negotiations. We commend to the parties the guidelines for attorneys' fees set out in *Environmental Defense Fund* v. *Environmmental Protection Agency*, Nos. 79–1811 & 79–1816 (D.C. Cir. Feb. 5, 1982); *Alabama Power Company* v. *Gorsuch*, No. 78–1006 (D.C. Cir. Feb. 5, 1982); *Anderson* v. *United States Department of the Treasury*, 648 F.2d 1 (D.C. Cir. 1979); *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980), and *Evans* v. *Sheraton Park Hotel*, 503 F.2d 117 (D.C. Cir. 1974). Finally, the same statutory language that allows us to make attorneys' fees awards in cases such as *Sierra Club*, limits our power to *judicial* proceedings. *Cf. New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 62 (1980); *Parker* v. *Califano*, 561 F.2d 320, 327 (D.C. Cir. 1977) (interpretation of statutes not containing limitations to administrative or judicial proceedings). Sierra Club and EDF are, therefore, not entitled to an award of attorneys' fees for their participation in the administrative proceedings preceding their appeal.

The parties are expected to keep this court abreast of the progress of their negotiations by filing a report within three months of the date this opinion issues. If

at that time it is clear that settlement is impossible, this court will fix an award for attorneys' fees.[10]

So Ordered.

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[10] We have taken due notice of Judge Wilkey's dissent in Alabama Power Co. v. Gorsuch, No. 78–1006 (D.C. Cir. Feb. 5, 1982). In that dissent Judge Wilkey expresses disagreement with our interpretation of section 307(f)'s "appropriate" specification and suggests that we have, on the one hand, "conjured up" a number of standards to define that statutory term, and, on the other, "enacted" a single "nonfrivolous" standard. *Id.* at 19. Further, by interpreting "appropriate" as we have, Judge Wilkey appears to accuse us of judicially legislating. First, we believe our opinion makes clear that we have articulated *one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have "substantially contributed" to the goals of the Clean Air Act. In applying that standard to the *Sierra Club* litigation, we have enumerated several relevant factors, derived from the legislative history and prior cases, which Judge Wilkey mistakenly reads as establishing several different standards. We believe that it is equally clear that the standard we have applied amounts to much more than a "non-frivolous" standard. *See* pp. 11–13 *supra*. Finally, we do not feel free either to ignore Congress' mandate to determine the appropriateness of an award in each case, or to rewrite its legislation and substitute "prevailing" for "appropriate." Congress expressly used "appropriate" as the standard in section 307(f); it specifically gave to *courts* the authority to interpret that standard on a case-by-case basis (an entirely logical delegation, since courts would be in the best position to assess the contributions of the parties and the importance of each case). That authority is akin to that which courts are already exercising under a variety of statutory provisions. *See* n.8 *supra*. Clearly Congress knows the difference between "prevailing" and "appropriate." *Compare* the statutory provisions cited in n.7, *supra*, with the attorneys' fees provision used in FOIA, n.8 *supra*. Judge Wilkey appears reluctant to permit courts to flesh out section 307(f) as Congress required them to do; we, on the other hand, are reluctant to rewrite the legislation itself.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

September Term, 1981

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

NATIONAL COAL ASSOCIATION, ET AL., INTERVENORS

AND CONSOLIDATED CASES

Filed—February 5, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of petitioner's (Sierra Club) motion for an award of attorneys' fees, and of its supplemental memorandum of points and authorities in support of that motion; of said petitioner's amended motion for attorneys' fees, the motion of petitioner Environmental Defense Fund for an award of attorneys' fees, the brief of respondent United States on the issue of attorneys' fees, and its response to petitioner Sierra Club's amended motion for attorneys' fees; the motion of respondent United States to bifurcate the issue of attorneys fees, petitioner Environmental Defense Fund's opposition to the motion to bifurcate, and petitioner's response to the brief of respondent United States and to its motion to bifurcate; of petitioner Environmental Defense Fund's amended motion for an award of attorneys' fees (with attachments), petitioner's reply to the response of respondent United States concerning the amended request for attorneys' fees, reply brief of respondent United States on the issue of attorneys' fees

for losing parties under 42 USC § 7607(f), petitioner Environmental Defense Fund's response to the reply brief of respondent; of petitioner Environmental Defense Fund's motion for leave to file an opposition in reply to respondent's memorandum on the proper size of an attorneys' fee award, time having expired, and of petitioner Sierra Club's motion for permission to file response to the memorandum of respondent United States on the proper size of an award of attorneys' fees to a losing litigant, out of time, and of said petitioner's lodged response, it is

ORDERED, by the Court, that the motions of petitioners Sierra Club and Environmental Defense Fund for leave to file responses to the memorandum of respondent United States on the proper size of any attorneys' fee award are granted and the Clerk is directed to file and to docket said responses, and it is

FURTHER ORDERED, by the Court, that attorneys' fees are awarded to petitioners Sierra Club and Environmental Defense Fund in such amounts as the parties may agree upon following further negotiations in accordance with the opinion of this Court filed herein this date. The parties are directed to keep this Court abreast of the progress of their negotiations by filing a report on or before May 5, 1982. If at that time it is clear that settlement is impossible, this Court will fix an award for attorneys' fees.

Per Curiam
FOR THE COURT:
GEORGE A. FISHER
Clerk

Dated: February 5, 1982
Opinion *Per Curiam*

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

NATIONAL COAL ASSOCIATION
ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213, and 80–1338

On Motion for Award of Attorneys' Fees

Decided July 16, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges.*

Opinion *Per Curiam.*

Opinion dissenting in part filed by *Senior Circuit Judge* ROBB.

PER CURIAM: In *Sierra Club* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) (hereinafter *Sierra Club II*), we held that an award of attorneys' fees to the Sierra Club and the Environmental Defense Fund ("EDF"), nonprevailing parties in *Sierra Club* v. *Costle*, 657 F.2d 298 (D.C. Cir. 1981) (hereinafter *Sierra Club I*), was "appropriate" under section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f), because those parties had "substantially contributed" to the goals of the Clean Air Act

Amendments of 1977 by litigating "important, complex and novel" issues of statutory interpretation. *Sierra Club II*, 672 F.2d at 39. At the express suggestion of the government, we postponed consideration of the precise amount of compensation to be awarded in order to allow the parties to resume negotiations which had been abruptly ended by a shift in government policy resulting in routine oppostion to the grant of attorneys' fees to non-prevailing parties. *Id.* at 34 n.2. Unfortunately, a settlement has proven impossible. Accordingly, we must now resolve the matter. Taking into account the decisions of this court in *National Association of Concerned Veterans* v. *Secretary of Defense*, No. 81–1364 (D.C. Cir. Apr. 23, 1982) (petition for rehearing and rehearing *en banc* pending) (hereinafter *NACV); Environmental Defense Fund* v. *Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982) (hereinafter *EDF* v. *EPA*); *Alabama Power Company* v. *Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982); *Anderson* v. *United States Department of the Treasury*, 648 F.2d 1 (D.C. Cir. 1979); and, most important, *Copeland* v. *Marshall*, 641 F.2d 880 (D.C. Cir. 1980) *(en banc)* (hereinafter *Copeland*), we find that Sierra Club is entitled to attorneys' fees amounting to $44,715 (plus $644.60 in expenses[1]) and that EDF is entitled to $45,874.80.

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[1] Sierra Club requested an award of $2,642.96 for expenses. In the exercise of our discretion, *see* 42 U.S.C. § 7607(f); *see also* Fed. R. App. P. 39, we do not allow expenses for filing fees ($139.42), brief printing ($658.94), and preparation of the appendix ($1,200). The $497.14 lawyer overhead costs, consisting of telephone calls and airfare documented prior to October 13, 1981, should be awarded, however, as out-of-pocket expenses not reimbursable in the counsel's *hourly* rate. Likewise, we allow $147.46 in similar expenses (telephone ($65.34) and copying ($82.12)) incurred since October 13, 1981; contrary to the government's assertion, they were properly documented. *See* Declaration of Joseph J. Brecher at 1 (May 5, 1982).

I. SIERRA CLUB'S REQUEST

Prior to the termination of fee negotiations in August, 1981, the government made a written offer of $32,265 to Sierra Club, which Sierra Club claims to have accepted before the government withdrew the offer under a revised policy of disputing all attorneys' fees claims by nonprevailing parties. Following our opinion in *Sierra Club II*, declaring that the Clean Air Act contemplated attorneys' fees awards in "appropriate" cases and holding *Sierra Club I* to be such a case, Sierra Club submitted a proposal for $60,656.75. This figure included Sierra Club's computation of the "lodestar"—"the number of hours reasonably expended multiplied by a reasonable hourly rate," *Copeland*, 641 F.2d at 891—on the basis of 479.5 hours at $110 per hour plus a 15% upward adjustment of the lodestar amount due to the government's alleged delaying tactics throughout the fee proceedings. *See* Sierra Club's Report To The Court And Second Amended Request For Attorneys' Fees at 2 (May 10, 1982) (hereinafter Sierra Club's Report). The government countered with an offer of $36,335, representing a reduction in hours and an hourly rate of $90 rather than $110 for time spent on the case-in-chief by the Sierra Club's attorney, Joseph Brecher.[2] *See id.* at Exhibit B. The government's figure, however, included the full 37 hours claimed for work on the attorneys' fees issue at $110 per hour. *Id.* The government predictably resisted any upward adjustment in the lodestar amount. *Id.* Sierra Club's final counteroffer, which was refused, was for 459.5 hours at $110 or $50,545.

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[2] Joseph Brecher is the only attorney for whom compensation is sought by Sierra Club. Sierra Club's original petition in May, 1981 had requested only $90 per hour for Brecher's time. This was revised in October to $110, after negotiations had broken off. Sierra Club's Report at Exhibit C.

Now Sierra Club requests $106,590 (and litigation costs of $2,642.96) based upon a lodestar of 484.5 hours (an additional 5 hours having been spent on fee negotiations) at $110 per hour, or $53,295, supplemented by a 50% upward adjustment for "exemplary" quality of representation and the public benefit conferred, and an additional 50% for delay in receipt of payment. The three main points of contention between Sierra Club and the government are: number of compensable hours, rate of pay for Brecher's time and the percentage of upward adjustment, if any.

A. *Number of Hours*

The government argues that Sierra Club's claim of 442.5 hours for work on the judicial aspect of its case-in-chief impermissibly includes non-litigation related activities as well as excessive hourly claims for certain litigation related activities. Specifically, approximately 67 hours for which Sierra Club seeks compensation were devoted to preparation of its administrative petition for reconsideration. The government correctly objects to these hours based upon our holding in *Sierra Club II*, which states: "the same statutory language that allows us to make attorneys' fees awards in cases such as *Sierra Club* [*I*], limits our power to judicial awards . . . . Sierra Club and EDF are, therefore, not entitled to an award of attorneys' fees for their participation in the administrative proceedings preceding their appeal." 672 F.2d at 42. Sierra Club's claim for these 67 hours is based upon a reading of that statement which lays too much emphasis upon the phrase "preceding their appeal," modifying "administrative proceedings." While it appears in this case that the petition for reconsideration to the Administrator was filed *after* an appeal from the decision on the final rule had been noticed, *Sierra Club II* was not intended to sanction attorneys' fees awards for administrative proceedings that happen to follow a

notice of appeal. Indeed, in our subsequent decision in *American Petroleum Institute* v. *Costle*, 665 F.2d 1176, 1191–92 (D.C. Cir. 1981), we made it clear that the filing of a petition for reconsideration was a statutory prerequisite to judicial review of procedural objections arising after the close of the comment period. Hence, we disallow the 67 hours spent on the petition for reconsideration, as well as 5.5 hours afterward devoted to research apparently connected therewith.[3]

Another 15.5 hours disputed by the government pertains to time Sierra Club claims to have spent preparing its petition for judicial review, a one-page document. The government concedes, United States' Response to Sierra Club's & Environmental Defense Fund's Status Reports and Amended Requests for Attorneys Fees at 9 (May 10, 1982) (hereinafter U.S. Response), that the "reasonable" number of hours spent on that document is "simply a matter of judgment." Although we note that a less experienced lawyer was allowed 42 hours for this purpose in *EDF* v. *EPA*, 672 F.2d at 50, we believe 10 hours is a reasonable amount here since the preparer was Brecher himself and his hourly rate a premium one. We additionally note the government did not object to 10 hours allocated by EDF for such a purpose in this proceeding.

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[3] These hours cover research on the following matters:

Date of Work	Description	Hours
1/23/80	Draft letter to Costle re: California SO_2 scrubbers	1.0
1/24/80	Submit letter re: 95% control	2.5
1/25/80	Research re: western scrubbers	.5
1/26/80	Draft letter to Costle re: S.C. Coal Project	1.5

Declaration Of Joseph J. Brecher In Support Of Sierra Club's Motion For An Award Of Attorneys Fees, Exhibit A at 4 (May 11, 1981). We have no indication that this research between January 23 and 26 was concerned exclusively with judicial matters. The petition for reconsideration was not denied until February, 1980.

Thus we disallow 78 of Brecher's hours for Sierra Club's case-in-chief. We also note, however, that Brecher documents 5 hours devoted to attorneys' fee negotiations since our decision in *Sierra Club II*, and we see no reason to limit the allowable time to the 37 hours previously expended as the government suggests. This makes the allowable total for Sierra Club 406.5 hours.

B. *Hourly Rate*

The government vigorously contests a rate of $110 per hour for Sierra Club's counsel. It suggests, citing *NACV*, that Sierra Club did not document its claim that $110 per hour was the "market rate" for Brecher's time by affidavits, from Brecher himself or from other counsel with comparable experience, showing billings for private clients at such a rate in comparable cases or recent court awards of fees to them in cases of comparable complexity. We do not think that affidavits of private attorneys like Brecher who represent primarily non-profit public interest organizational clients about their billing practices are necessary in all cases, especially where evidence of recent court awarded fees in comparable cases to comparably experienced lawyers exists to satisfy the demands of *Copeland* and *NACV* that court awarded fees be based on the prevailing market rate for the attorney's services.[4]

For several reasons, we believe that the $110 hourly rate is proper for Brecher's time. First, Joseph Brecher is a well known environmental lawyer, who is retained by the Sierra Club Legal Defense Fund to represent

[4] *NACV*, slip op. at 8, recognizes that "lawyers associated with public interest groups or single practitioners who specialize in Title VII or FOIA cases . . . may not have an established 'billing rate' that reflects how their own services have been valued in the market."

them in many litigation matters. He has continuously engaged in the practice of environmental law since 1970, representing primarily environmental organizations and Indian tribes before state and federal courts including the Supreme Court of the United States. He is the author of books and articles on environmental law and teaches that subject at Golden Gate Law School. Second, in our *Sierra Club II* opinion we alluded to the "technical complexity of the case" and its need for "extensive preparation" as well as its "importance to the national welfare." Third, we have a very recent precedent in our own court awarding $110 per hour fees expressly based upon prevailing market rates to a comparably experienced public interest lawyer in a comparably complex environmental case. In *EDF* v. *EPA*, 672 F.2d at 58, the court stated:

> In this case, given the importance of the post-decision negotiations, the high level of skill required (to maintain a litigation victory and yet accommodate to the legitimate needs and interests of numerous intervenors and a federal agency), the significant public interest value of the litigation, and the going "market value" for the services of a lawyer with rate claimed for Mr. Butler is perfectly reasonable.[5]

See also Palila v. *Hawaii Dept. of Land & Natural Resources*, 512 F. Supp. 1006 (D. Hawaii 1981) ($110 per hour fee award).

Finally, the government suggests we lower the hourly rate because Sierra Club did not prevail. We decline to do so for the same reasons we declined to lower the

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[5] In *EDF* v. *EPA*, 672 F.2d at 58, we noted that "EPA does not seriously contest the accuracy of rates cited by EDF insofar as 'market value' is concerned." Butler, *see EDF* v. *EPA*, 672 F.2d at 50, and Brecher have been in environmental practice for the same period of time, spearhearing the same kinds of litigation.

hours "reasonably expended" in *EDF* v. *EPA* on issues on which EDF did not prevail. *See EDF* v. *EPA*, 672 F.2d at 55. In so doing, we do not suggest such a reduction may never be proper. *See Copeland*, 641 F.2d at 893. Nonetheless, here the public service benefits of the litigation and the relative modesty of the fee for Brecher's gargantuan efforts on the case do not in our opinion warrant any reduction if the Clean Air Act's overriding purpose of encouraging constructive legal challenges, which would not otherwise be brought for lack of economic incentive, is to be served.

C. *Adjustments to the Lodestar*

Sierra's lodestar then is 406.5 hours at $110 per hour or $44,715. Sierra Club asks for a "substantial upward adjustment in the lodestar," *i.e.*, 100% based on the three factors identified in *Copeland* and *EDF* v. *EPA*: quality of representation; public benefit; and delay in receipt of payment. We decline, however, to allow any upward adjustment in this case for the following reasons:

We think it is proper to consider in this regard, as the government suggests, that Sierra Club did not prevail on any issue. The aim of "appropriate" attorneys' fees is to encourage parties without economic incentives to litigate important issues, but such efforts cannot be risk-free. Compensation for reasonable hours at market rates will generally be sufficient where the party has not prevailed.[6] *See Copeland*, 641 F.2d at 844 ("The

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[6] As we repeated recently in *EDF* v. *EPA*, 672 F.2d at 59 n.16 (citing *Copeland*, 641 F.2d at 892), "[t]he burden of justifying any deviation from the 'lodestar' rests on the party proposing the deviation." *See also EDF* v. *EPA*, 672 F.2d at 61:

> Finally, we must also consider the "results of the litigation." *Copeland*, 641 F.2d at 894. Although petitioners need not "prevail" in order to claim attorneys' fees under TSCA, we believe that "non-prevailing" is a factor that

'lodestar' itself generally compensates lawyers adequately for their time. An upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client.") *EDF* v. *EPA*, 672 F.2d at 59–61, allowed a "modest" adjustment of 15–20% to reflect benefits to the public as well as the delay in receipt of payment. In that case, however, the claimants had prevailed on several of the issues in the suit. And although it is true that payments were delayed here, as well as in *EDF* v. *EPA*, through an initial termination in negotiations, on balance we do not consider the government's desire to test its new "prevailing party" fee policy in court so arbitrary as to court penalties. Sierra Club's counsel is being paid at $110 per hour, the current market rate, whereas his original request was for $90 per hour, thus according him some compensation for the delay. *See EDF* v. *EPA*, 672 F.2d at 60; *Copeland*, 641 F.2d at 893 n.23. As in *EDF* v. *EPA*, we allow no adjustment for the contingency factor since Sierra Club is being paid despite its non-prevailing status. And while the quality of representation by Sierra Club was exemplary, we believe the $110 rate, though perhaps lower than that billable to private clients, is still near the top level of court awarded fees and incorporates a presumption of skill and dedication of the type exhibited by legal craftsmen of Mr. Brecher's capabilities in this area of the law.

II. EDF's Request

EDF requests attorneys' fees of $98,359.50 reflecting $62,010 for services rendered by EDF's own attorneys,

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should militate against upward adjustments in the "lodestar." Here, EDF lost on one of three issues decided by the court in *EDF* v. *EPA*. The issue was hardly insignificant and, therefore, it cannot be ignored in our calculations.

and $36,349.50 for their retained counsel, Trilling & Kennedy, who worked on the attorneys' fees portion of the proceeding. The Trilling & Kennedy amounts reflect upward adjustments of 80% (for the period between February and May, 1982) and 100% (for the prior period). *See* Motion Of The Environmental Defense Fund To Amend And Supplement Its Application For Attorneys' Fees And Amended Application Therefore at 2 (May 17, 1982) (hereinafter Motion of the EDF).[7]

A. *Number of Hours*

EDF claims 398 hours for the work of four staff attorneys.[8] The government has no quarrel with this

[7] EDF originally accepted the government's offer of $30,125 in October, 1981 before the government's withdrawal of the offer. On March 29, 1982, EDF stated that a lodestar of $31,005 for EDF attorneys and $9,795.50 for Trilling & Kennedy would be satisfactory if "multiplied by an appropriate upward adjustment." Motion of the EDF at Exhibit 1.

[8]

	Butler	Rauch	Corcoran	Lennett
Preparation of Petition for Review (filed 8-10-79)		10		
Motion for Order Compelling EPA to Convene Proceedings for Reconsideration (filed 10-26-79)		21		
Reply to EPA's Opposition to Said Motion (filed 11-28-79)	3.5	30		
Preparation of Petition for Review of Order Denying Petition for Reconsideration (filed 2-19-80)		7		
Motion for Discovery and Memorandum in Support Thereof (filed 4-11-80)		15	24	
Reply to EPA's Opposition to Said Motion, Motion to Supplement the Record & Memorandum in Support Thereof (filed 5-14-80)	17.5	40	35	19
Reply to EPA's Response to Motion to Supplement the Record (filed 5-28-80)	10			
EDF Brief (filed 7-11-80)	40		25	

number. It does, however, dispute the additional 179 hours[9] claimed for Trilling & Kennedy, asserting that there was no need for both partners to represent EDF at fee negotiations and consultations.[10] In support the government cites *Copeland*, 641 F.2d at 891: "no compensation is due for non-productive time. For example, where three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." We are satisfied, however, that such was not the case here. We have carefully surveyed the documentation by Trilling & Kennedy and have assured ourselves that their efforts were not duplicative. *See, e.g.*, Motion of the EDF, Declaration of Bingham Kennedy.

We are, however, troubled by a claim of close to $20,000 for time spent attempting to collect $31,005. Of course, the government must pay some price for an unsuccessful, even if *bona fide*, effort to block an award in *Sierra Club I*. But approximately half of the 179 hours was for time spent by Trilling & Kennedy during the three months following our decision in *Sierra Club*

EDF Reply Brief (filed 9-30-80) and Preparation for Oral Argument	50		30	14
Attorneys Fees Request				7
TOTAL	121	123	114	40

[9] Hours claimed are: Kennedy, 50.75; Trilling, 102.80; Doherty, 25.5 *See* Motion of the EDF, Declaration of Bingham Kennedy at 22–24; Memorandum In Support Of Amended Motion For Attorneys' Fees And In Reply To Respondent's Opposition To EDF's Request For An Award Of Attorneys' Fees at 39 (Nov. 13, 1981). An additional 6.05 hours were recently requested, which we allow in full. Reply of Petitioner EDF To May 27, 1982 U.S. Response at 6 (June 9, 1982).

[10] In *EDF* v. *EPA*, 672 F.2d at 62, the total hours awarded to Trilling & Kennedy were 84.8.

II. During that same period, Brecher spent five additional hours on Sierra Club's attorneys' fees claim. In retrospect, Sierra Club seems to have been more prudent, but we cannot say all but five hours of Trilling & Kennedy's time was unreasonably spent. However, after examining the time sheets and affidavits of Trilling & Kennedy, we feel that some reduction is in order. We conclude that only 40.38 hours were reasonably expended after February 5. (This represents a downward adjustment of approximately 50%.) With the adjustments noted on Trilling & Kennedy's May 18, 1982 erratum, the total hours recognized for Trilling & Kennedy are 147.93.

B. *Rates of Pay*

Although the government makes a general challenge to EDF's rate of pay for its attorneys on the basis that it does not accord with *NACV* standards of proof for "market value," we are not convinced. The EDF lawyers are billed per hour respectively at $110 for chief counsel William Butler, $75 for Robert Rauch, and $55 each for Larry Corcoran and David J. Lennett. Since all are employed by a public interest organization, they cannot be expected to submit client billings. Further, *EDF* v. *EPA* approved hourly rates for Butler and Lennett of the same amount claimed here. *See also Copeland*, 641 F.2d at 902 ($57 hourly rate for associates is reasonable). And as to the other two EDF attorneys (Rauch and Corcoran): Rauch has 7 years of experience in environmental work and is asking $75 per hour—this is certainly comparable to the rate applied to Ms. Warren who received $90 per hour in *EDF* v. *EPA* and who had 9 years of the same kind of experience—and Corcoran is of the same vintage as Mr. Lennett. The government interposes no specific objection to the rate of pay ($110 per hour) for Trilling & Kennedy's service and only a minor objection to the

rate of pay for EDF's attorneys.[11] Thus, EDF is entitled to an award of $45,874.80, calculated as follows:

	Rate/Hr.	Hrs.	Lodestar	
Butler	$110	121	$13,310.00	
Rauch	75	123	9,225.00	
Corcoran	55	114	6,270.00	
Lennett	55	40	2,200.00	
			$31,005.00	
Kennedy	$110	50.75	$ 5,582.50	
Trilling	110	102.80	11,308.00	
Doherty	55	25.50	1,402.50	
Adjustment to Trilling & Kennedy hours	110	(37.17)	(4,088.70)	
Additional hours spent to respond to U.S. Response[12]	110	6.05	665.50	
			$14,869.80	
				$45,874.80

[11] *See* Declaration of Jose R. Allen at 7 (May 27, 1982):

	Hours	Rate	Lodestar
William Butler	121	$100/hr ($110/hr)	$12,100 ($13,310)
Robert Rauch	123	$75/hr ($75/hr)	$ 9,225 ($ 9,225)
Larry Corcoran	114	$50/hr ($55/hr)	$ 5,700 ($ 6,270)
David Lennett	40	$40/hr ($55/hr)	$ 1,600 ($ 2,200)
Legal Intern*	75	$20 hr (0)	$ 1,500(0)
Totals			$30,125 ($31,005)

*EDF did not claim any hours for the work of a legal intern in its amended motion.

(EDF figures inside parentheses; government figures outside parentheses.)

[12] *See* n.9 *supra*.

For the reasons detailed above, we decline to allow any upward adjustment to that figure.

Judgment Accordingly

ROBB, *Senior Circuit Judge, dissenting in part:* I agree that Sierra Club and the Environmental Defense Fund are entitled to some attorneys' fees despite their lack of success on the merits. I also agree with the court's calculation of hours reasonably expended and hourly rates. However, when a litigant loses on every issue in the case, as here, I think the "appropriate" standard under section 307(f) of the Clean Air Act calls for some reduction in the lodestar amount. Accordingly, I dissent from the portion of the majority opinion discussing adjustments to the lodestar.

In *Copeland v. Marshall*, 205 U.S. App. D.C. 390, 641 F.2d 880 (1980) (*en banc*), this court stated that adjustments to the lodestar "may be upward or downward," noting "[a]n upward adjustment for quality is appropriate only when the attorney performed exceptionally well, or obtained an exceptional result for the client." *Id.* at 404, 641 F.2d at 894. Considering result as part of the quality assessment, it is hard to imagine a better case for downward adjustment than this one. If counsel were private practitioners their clients might well complain that they could have lost the case for less money.

This argument applies with special force to statutes such as section 307(f), which permit awards of attorneys' fees to non-prevailing parties where "appropriate". One purpose of awarding fees to non-prevailing parties is to shift the costs of a private lawsuit to the "taxpaying public, which receives the benefits of [the] litigation." *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331, 1338 (1st Cir. 1973), *cited in* H. Rep. No. 95–294, 95th Cong., 1st Sess. 337. Reducing

the award in this case would recognize the diminished value of a losing lawsuit to the public.

This court has refused to reduce the lodestar to account for lack of success when a party lost on only one of three issues. *See Environmental Defense Fund v. EPA*, ___ U.S. App. D.C. ___, 672 F.2d 42 (1982). Here, however, the petitioners lost on every issue; they batted zero. If downward adjustments to the lodestar are ever to be made as *Copeland v. Marshall* suggests, this is an "appropriate" place to start.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79-1565
September Term, 1981

SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, Respondent

NATIONAL COAL ASSOCIATION, ALABAMA POWER ASSOCIATION, ET AL., INTERVENORS

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and consolidated case Nos. 79-1719, 79-1867, 79-1874, 80-1187, 80-1201, 80-1213, and 80-1338.

Filed—July 16, 1982

Before: ROBB, WALD and GINSBURG, *Circuit Judges*

ORDER

It is ORDERED by the Court, *sua sponte*, that the opinion for the Court filed in the above entitled case be, and it hereby is, amended as follows:

Page 2, line 23—delete "(petition for rehearing and rehearing *en banc* pending)" and insert in lieu thereof "(as amended July 15, 1982)".

PER CURIAM
FOR THE COURT
GEORGE A. FISHER
Clerk

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 79–1565
September Term, 1981
SIERRA CLUB, PETITIONER

v.

ANNE M. GORSUCH, Administrator of the Environmental Protection Agency, RESPONDENT

And Consolidated Case Nos. 79–1719, 79–1867, 79–1874, 80–1187, 80–1201, 80–1213 and 80–1338

Filed—July 16, 1982

Before: ROBB, *Senior Circuit Judge*, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of the parties' reports to the Court on the status of settlement negotiations relating to attorneys' fees, of petitioners' amended requests for attorneys' fees, of respondent's statements in response to petitioners' status reports and to their amended requests for attorneys' fees, and of the replies thereto, and for the reasons set forth in the Opinions for the Court filed herein on February 5, 1982 and on this date, respectively, it is

ORDERED, by the Court, that petitioner Sierra Club is entitled to attorneys' fees amounting to $44,715. (plus $644.60 in expenses) and that petitioner Environ-

mental Defense Fund is entitled to attorneys' fees in the sum of $45,874.80, all payable by respondent.

PER CURIAM
FOR THE COURT
GEORGE A. FISHER
Clerk

Date: July 16, 1982
Opinion Per Curiam
Opinion dissenting in part filed by Senior Circuit Judge Robb.

APPENDIX D

Parties to the Petitions for Review in the court below, on the merits of those petitions, and who did not participate on the issue of attorneys' fees, are:

Alabama Power Company; Arizona Public Service Company; Appalachian Power Company; Arkansas-Missouri Power Company; Arkansas Power & Light Company; Baltimore Gas and Electric Company; Boston Edison Company; Carolina Power & Light Company; Central Hudson Gas & Electric Corporation; Central Illinois Light Company; Central Illinois Public Service Company; Central Maine Power Company; Central Power & Light Company; Central & South West Corporation; Cincinnati Gas & Electric Company; Columbus and Southern Ohio Electric Company; Commonwealth Edison Company; Connecticut Light and Power Company; Consolidated Edison Company of New York, Inc.; Consumers Power Company; Dayton Power and Light Company; Delmarva Power and Light Company; Detroit Edison Company; Duke Power Company; Edison Electric Institute; Florida Power Corporation; Florida Power & Light Company; General Public Utilities Corporation; Georgia Power Company; Gulf Power Company; Gulf States Utilities Company; Hartford Electric Light Company; Holyoke Water Power Company; Houston Lighting & Power Company; Illinois Power Company; Indiana & Michigan Electric Company; Indianapolis Power & Light Company; Iowa-Illinois Gas and Electric Company; Iowa Power and Light Company; Iowa Public Service Company; Jersey Central Power & Light Company; Kansas City Power & Light Company; Kentucky Power Company; Kentucky Utilities Company; Louisiana Power & Light Company; Madison Gas and Electric Company; Metropolitan Edison Company; Middle South Utilities, Inc.; Minnesota Power & Light; Mississippi Power Company; Mississippi Power & Light Company; Missouri Associa-

tion of Municipal Utilities; Monongahela Power Company; National Coal Association; National Rural Electric Cooperative Association; Nevada Power Company; New England Power Company; New Orleans Public Service, Inc.; New York State Electric & Gas Corporation; Niagara Mohawk Power Corporation; Northeast Utilities Service Company; Northern Indiana Public Service Co.; Northern States Power Company; Ohio Edison Company; Ohio Power Company; Ohio Valley Electric Corporation; Oklahoma Gas & Electric Company; Pacific Power & Light Company; Pennsylvania Electric Company; Pennsylvania Power Company; Pennsylvania Power & Light Company; Portland General Electric Company; Potomac Edison Company; Potomac Electric Power Company; Public Service Company of Indiana, Inc.; Public Service Company of Oklahoma; Public Service Electric & Gas Company; Rochester Gas & Electric Corporation; Salt River Project; San Diego Gas & Electric Company; Southern California Edison Company; Southwestern Electric Power Company; State of California Air Resources Board; Tampa Electric Company; Texas Utilities Generating Company; Toledo Electric Power Company; Tucson Electric Power Company; Union Electric Company; Utah Power & Light Company; Virginia Electric & Power Company; Western Massachusetts Electric Company; West Penn Power Company; West Texas Utilities Company; Wisconsin Electric Power Company; Wisconsin Power & Light Company; and Wisconsin Public Service Corporation.